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BY

JAMES STEPHEN, ESQ., LL.D.,

JUDGE OF COUNTY COURTS.

The Eighth Edition.

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ON

THE LAWS OF ENGLAND.

BOOK VI.

OF CRIMES.

CHAPTER I.

OF THE NATURE OF CRIMES AND THEIR PUNISHMENTS.

WE are now arrived at the sixth and last branch of the Commentaries; which treats of *public wrongs*, or *crimes*. For it will be remembered that wrongs were divided into two species; the one *private*, and the other *public* (*a*). Private wrongs, otherwise termed *civil injuries*, were the subject of the preceding Book. [We are, therefore, lastly, to proceed to the consideration of public wrongs, or crimes: in pursuit of which we shall consider, firstly, the general nature of crimes and punishments; secondly, the persons capable of committing crimes; thirdly, their several degrees of guilt as principals or accessories; fourthly, the several species of crimes, with the punish-

(*a*) Vide sup. vol. I. p. 136.

[ment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and, sixthly, the method of inflicting those punishments which the law has annexed to each crime respectively.

First, as to the general nature of crimes and their punishment: the discussion and admeasurement of which forms, in every country, the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the "*pleas of the crown*," so called because the sovereign,—in whom centres the majesty of the whole community,—is supposed by the law to be the person injured by every wrong done to that community; and is therefore, in all cases, the proper prosecutor for every such offence.

The knowledge of this branch of jurisprudence, which teaches the nature, extent and degrees of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the State. For, as a very great master of the crown law (*b*) has observed upon a similar occasion, no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events which the compass of a day may bring forth, will teach us, (upon a moment's reflection,) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded on principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and

(*b*) Sir Michael Foster, pref. to Rep.

[justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes, (provided there be no transgression of these eternal boundaries,) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the State which it is meant to govern. And yet either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition and revenge; or from retaining the discordant political regulations which successive conquerors or factions have established in the various revolutions of government; or from giving a lasting efficacy to sanctions that were intended to be temporary, and made, (as Lord Bacon expresses it,) merely upon the spur of the occasion; or, lastly, from too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence;—from some or from all of these causes it hath happened, that the criminal law is, in every country of Europe, more rude and imperfect than the civil. And even with us in England, where our Crown law is, with justice, supposed to be more nearly advanced to perfection; where crimes are more accurately defined and penalties less uncertain and arbitrary; where all our trials are in the face of the world; where torture is unknown, and every delinquent is judged by those of his equals against whom he can form no exception, nor even a personal dislike (*c*):] —yet our criminal code was long deformed by an unwise

(*c*) 4 Bl. Com. p. 3. Blackstone adds, that if bills, introductory of new penal enactments, were first referred to some of the learned judges before they were entertained in parliament, it would not have been possible "that in the "eighteenth century it could ever "have been made a capital crime "to break down, however maliciously, the mound of a fish "pond whereby any fish shall "escape; or to cut down a cherry-"tree in an orchard; as provided "respectively by stat. 9 Geo. 1, "c. 22; 31 Geo. 2, c. 42. And "were even a committee appointed "but once in 100 years to revise "the criminal law, it could not "have continued to this hour a "capital felony to be seen for one "month in the company of persons who called themselves, or "are called Ægyptians; as pro-

and inhumane severity; and though in modern times many signal reforms have been introduced into this branch of our juridical system, even now, no candid commentator can pronounce upon it an unmixed encomium. We shall proceed now to consider, in the first place, the general nature of crimes; and this as regards, first, the crime itself; and, secondly, the punishment.

I. A crime is the violation of a right, when considered in reference to the evil tendency of such violation, as regards the community at large (*d*).

[The distinction of public wrongs from private—of crimes from civil injuries—seems upon examination principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a violation of the same rights, considered in reference to their effect on the community in its aggregate capacity (*e*). As if I detain a field from another man, to which the law has given him a right,—this is a civil injury and not a crime: for here only the right of an individual is

"vided by 1 Ph. & M. c. 4, and "5 Eliz. c. 20." It is scarcely necessary to remark, that all these sanguinary laws are now repealed. As to the two first-mentioned offences, the repeal is by 4 Geo. 4, c. 44, and 7 & 8 Geo. 4, c. 30, ss. 15, 19; as to the last, by 23 Geo. 3, c. 51, and 1 Geo. 4, c. 116.

(*d*) The definition of Blackstone (vol. iv. p. 5), is as follows: "A "crime or misdemeanor is an act "committed or omitted, in viola- "tion of a public law either for- "bidding or commanding it." But this scarcely points out the difference between a crime and a civil injury.

(*e*) The expression of Blackstone (ubi sup.) is, "A breach and vio- "lation of the public rights and "duties due to the whole com- "munity, considered as a com- "munity in its social and aggre- "gate capacity." We are thus presented with another definition of crime; but it is not more satisfactory than the first, for it merely raises the question of what is meant by "public rights due to the community." If the expression is intended to exclude *private* rights due to the individual, the definition seems wrong; for a violation of such rights as these clearly amounts to a crime; as in the case of a murder or battery.

[concerned, and it is immaterial to the public which of us is in possession of the land. But treason, murder and robbery, are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity. In all cases, crime includes an injury: every public offence is also a public wrong, and somewhat more; it affects the individual, and it likewise affects the community (*f*). Thus treason in imagining the sovereign's death, involves in it conspiracy against an individual, which is also a civil injury; but as this species of treason in its consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, —this raises it to a crime of the highest magnitude. Murder is an injury to the life of an individual: but the law of society considers principally the loss which the State sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view: it is an injury to *private* property; but were that all, a civil satisfaction in damages might atone for it: the *public* mischief is the thing for the prevention of which our laws have made it a felonious offence. In these gross and atrocious injuries, the private wrong is swallowed up in the public. We seldom hear any mention made of satisfaction to the individual, the satisfaction to the community being so very great (*g*). But there are crimes of an inferior nature, in which the public punishment is not so severe; and herein

(*f*) "All crimes affect the public, and most crimes specially affect individuals. But in some the injury to the public is most obvious, in others the injury to individuals." (Report of the Criminal Code Bill Commission, p. 14.)

(*g*) There still exists, however, a remedy for the private wrong; even in cases of felony, it is only *suspended* during the prosecution for the crime. The authorities for this doctrine are collected and reviewed by the Court of Queen's Bench in the case of Stone *v.* March, 6 B. & C. 551, which was an action against the surviving partners of Fauntleroy the forger, connected with felonious transactions in which he had been engaged.

[the distinction of crimes from civil injuries is very apparent. For instance, in the case of battery or beating another, the aggressor may be indicted for this, at the suit of the Crown, for disturbing the public peace, and be punished criminally by fine and imprisonment: and the party beaten may also have his private remedy by action of trespass, for the injury which he in particular sustains; and recover a civil satisfaction in damages (*h*). So also in case of a public nuisance,—as digging a ditch across a highway—this is punishable by indictment as a common offence to the whole kingdom and all the king's subjects; but if any individual sustains any special damage thereby, —as laming his horse, breaking his carriage, or the like,— the offender may be compelled to make ample satisfaction, as well for the private injury as for the public wrong.

Upon the whole we may observe, that, in taking cognizance of all wrongs or unlawful acts, the law has a double view, viz. not only to redress the party injured, by either restoring to him his right (if possible), or by giving him an equivalent,—the manner of which was the object of our inquiries in the fifth book of these Commentaries; but also to procure to the public the benefit of society; by preventing or punishing every breach or violation of those laws which the sovereign power has thought proper to establish, for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present Book.]

In ordinary language we understand, when we speak of crimes, such only as are subjects for *indictment*,—a proceeding of which we shall have occasion to speak hereafter. For such breaches of law as are not the subjects for indictment, and are punishable merely by a pecuniary

(*h*) Under certain circumstances, however, a person who has been convicted and fined for an assault or battery, is freed thereby from further civil proceedings in respect of the same cause. (See 24 & 25 Vict. c. 100, s. 45.)

penalty recoverable on a summary conviction before one or more justices of the peace, are not usually designated as crimes, but by the more general term of "offences." Crimes thus understood (or indictable offences) consist either of *misdemeanors* or *felonies*. The term *misdemeanor* being, properly speaking, synonymous with that of crime; though, in common usage, the word is made to denote such crimes as amount not to *felonies* (*i*). Into the nature and meaning of the latter denomination, it will be expedient to enter a little more at large.

[Felony, in the general acceptation of our English law, comprises every species of crime, which occasioned *at common law* the forfeiture of lands and goods (*k*). Treason itself, says Sir Edward Coke, was antiently comprised under the name of felony (*l*); and in confirmation of this we may observe that the statute of treasons, (25 Edw. III. c. 2,) speaking of some dubious crimes, directs a reference to parliament, that it may be there adjudged "whether they be treason or *other* felony." All treasons, therefore, strictly speaking, are felonies, though all felonies are not treason.

To explain this matter a little further: the word *felony*, or *felonia*, is of undoubted feudal origin (*m*); but the derivation of it has much puzzled the juridical lexicographers Prateus, Calvinus, and the rest; some deriving it from the Greek φηλός, an impostor or deceiver; others from the Latin *fallo*, *fefelli*, to countenance which they would have called it *fallonia*. Sir E. Coke, as his manner is, has

(*i*) As to the technical force of the words "misdemeanor" and "felony" in an indictment, see R. *v.* Powell, 2 B. & Ad. 75; Ryalls *v.* The Queen, 11 Q. B. 794; Campbell *v.* The Queen, ib. 799. In order to prevent any failure of justice by reason of this technical distinction, it has been provided that if upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor. (See 14 & 15 Vict. c. 100, s. 12; The Queen *v.* Thomas, Law Rep., 2 C. C. R. 141.)

(*k*) Vide sup. vol. I. p. 439.

(*l*) 3 Inst. 15.

(*m*) See Gloss. tit. Felon.

[given us a still stranger etymology (*n*),—that it is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description that it is such a crime as occasioned the forfeiture of all the offender's lands or goods. And this gives great probability to Sir H. Spelman's Teutonic or German derivation of it; in which language indeed, (as the word is clearly of feudal origin,) we ought rather to look for its signification than among the Greeks and Romans.

According to Spelman, then, *fe-lon* is derived from two northern words: **fee**, which signifies the fief, feud, or beneficiary estate; and **lon**, which signifies price or value. Felony is therefore the same as *pretium feudi;* the consideration for which a man gives up his fief; as we say, in common speech, such an act is as much as your life or estate is worth. In this sense it will clearly signify the feudal forfeiture, or act by which an estate was forfeited or escheated to the lord.

To confirm this we may observe, that it is in this sense of forfeiture to the lord, that the feudal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeiture of copyhold estates (*o*), are styled *felonia* in the feudal law: "*scilicet per quas feodum amittitur*" (*p*). As "*si domino deservire noluerit*" (*q*); "*si per annum et diem cessaverit in petendâ investiturâ*" (*r*); "*si dominum ejuraverit, i. e. negaverit se a domino feudum habere*" (*s*); "*si a domino, in jus eum vocante, ter citatus non comparuerit*" (*t*): all these, with many others, are still causes of forfeiture in our copyhold estates; and were denominated felonies by the feudal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures; as assaulting or beating the lord (*u*), or vitiating

(*n*) 1 Inst. 391.
(*o*) Vide sup. vol. I. p. 627.
(*p*) Feud. l. ii. t. 16.
(*q*) Ib. l. i. t. 21.
(*r*) Ib. l. ii. t. 24.
(*s*) Ib. t. 26, s. 3, t. 34.
(*t*) Ib. t. 22.
(*u*) Ib. l. ii. t. 24, s. 2.

[his wife or daughter, "*si dominum cucurbitaverit, i. e. cum uxore ejus concubuerit*" (*x*). And as these contempts or smaller offences were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand, the lord might be guilty of felony, or forfeit his seigniory to the vassal, by the same acts as the vassal would have forfeited his feud to the lord: "*si dominus commiserit feloniam, per quam vasallus amitteret feudum si eam commiserit in dominum, feudi proprietatem etiam dominus perdere debet*" (*y*). One instance given of this sort of felony in the lord, is beating the servant of his vassal, so that he lost his service; which seems merely in the nature of a civil injury, so far as it respects the vassal. And all these felonies were to be determined "*per laudamentum sive judicium parium suorum*" in the lord's court, as with us forfeitures of copyhold lands are presentable by the homage in the court baron.

Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why,—upon the introduction of that law into England,—those crimes which induced such forfeiture or escheat of lands,—and, by a small deflexion from the original sense, such as induced the forfeiture of goods also,—were denominated felonies. Thus it was said that suicide, robbery, and rape were felonies; i. e. the consequence of such crimes was forfeiture; till, by long use, we began to signify by the term of felony the actual crime committed, and not the penal consequence.]

Hence it follows, that capital punishment does by no means enter into the true idea and definition of felony (*z*).

(*x*) Feud. l. i. t. 5.

(*y*) Ib. l. ii. t. 26, 47.

(*z*) At common law, however, the idea of felony was in general connected with that of capital punishment; "and therefore, if a statute "makes any new offence felony, "the law implies that it shall be "punished with death, viz. by "hanging, as well as with forfeiture, unless the offender prays the "*benefit of clergy*, which all felons "are entitled once to have, provided the same is not expressly "taken away by statute" (4 Bl. Com. 97). "The distinction be-

Felony may be without capital punishment, as in the cases of self-murder, manslaughter, larceny, and many other offences made felonies by statute. And at a period of our law when punishment by death was more frequent than now, instances are not wanting where an offence was capital, though, (as it worked no forfeiture of land or goods,) it was no *felony*,—as, for example, in the case of heresy, by the common law (*a*). And thus, too, the punishment at the common law for standing mute without pleading to an indictment was capital, but without any forfeiture; and therefore such standing mute was no felony. In short the true criterion of felony is forfeiture; and accordingly, up to a very recent time, all felonies occasioned a forfeiture of the goods and chattels of the offender, and in some cases of his lands also. But the law as to this—though still of importance to the student—has been now altered. For by the 33 & 34 Vict. c. 23 ("The Felony Act, 1870"), it was enacted, that, after the passing of that statute, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any forfeiture (*b*).

II. [The nature of crimes being thus ascertained and distinguished, we proceed in the next place to consider the general nature of *punishments*; which are evils or inconveniences consequent on crimes and misdemeanors; being devised, denounced, and inflicted by human laws in consequence of disobedience or misbehaviour in those to regulate whose conduct such laws were respectively made.

tween felony and misdemeanor was, in early times, nearly, though not absolutely, identical with the distinction between crimes punishable with death and crimes not so punishable. But the great changes which have taken place in our criminal law have made the distinction nearly, if not altogether, unmeaning" (Report of Criminal Code Bill Commission, p. 14).

(*a*) 4 Bl. Com. 97.

(*b*) This enactment (sect. 1) concludes as follows: "provided that nothing in this Act shall affect the law of forfeiture consequent upon *outlawry*." By 42 & 43 Vict. c. 59, s. 3, outlawry in *civil* proceedings is abolished.

[And herein we will briefly consider the *power*, the *end* and the *measure* of human punishments.

1. As to the *power* of human punishment; or the right of the legislator to inflict discretionary penalties for crimes and misdemeanors (*c*). It is clear that the right of punishing crimes against the law of nature,—as murder and the like,—is in a state of mere nature vested in every individual. For it must be vested in *somebody*, otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution; and if that power is vested in any *one*, it must also be vested in *all* mankind, since all are by nature equal. Whereof the first murderer, Cain, was so sensible, that we find him expressing his apprehensions, that *whoever* should find him would slay him (*d*). In a state of society, this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils which civil government was intended to remedy: and hence, whatever power individuals once had of punishing offences against the law of nature, is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community.

As to offences merely against the laws of society, which are only *mala prohibita* and not *mala in se* (*e*), the magistrate is also empowered to inflict coercive penalties for such transgressions: and this, again, by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with a right of making laws, and of enforcing obedience to them when made, by exercising upon their non-observance severities adequate to the evil.

The lawfulness, therefore, of punishing such criminals is founded upon this principle,—that the law by which they suffer was made by their own consent. It is a part

(*c*) See Grotius, De J. B. et P. l. 2, c. 20; Puff. L. of Nat. and N. b. 8, c. 3.

(*d*) Gen. iv. 14.

(*e*) As to this distinction, vide sup. vol. I. pp. 35, 38.

[of the original contract into which they entered when first they engaged in society; it was calculated for, and has long contributed to, their own security (*f*).

This right, then, being thus conferred by universal consent, gives to the State exactly the same power, and no more, over all its members, as each individual member had naturally over himself or others; which has occasioned doubt, how far a human legislature can justifiably inflict capital punishment for *positive* offences against the municipal law only, and not against the law of nature; since no individual has naturally a power of inflicting death upon himself or others, for actions in themselves indifferent. With regard to offences *mala in se*, capital punishment is in some instances inflicted by the immediate *command* of God himself to all mankind; as, in the case of murder, by the precept delivered to Noah, (their common ancestor and representative,) "Whoso sheddeth man's blood by man shall his blood be shed" (*g*).] But as regards mere *mala prohibita*, capital punishment (supposing it to be lawful at all,) is a sanction never to be resorted to by the legislature without the utmost circumspection (*h*). [It may be safely laid down in reference to this subject, that it is the enormity or dangerous tendency of the crime, that alone can warrant any earthly legislature in putting him to death that commits it (*i*). It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For though the end of punishment is to deter

(*f*) Vide sup. vol. I. p. 28.

(*g*) Gen. ix. 6.

(*h*) Blackstone seems neither to deny, nor to admit, the right of the legislature to inflict death in the case of mere *mala prohibita*; but he justly remarks (vol. iv. p. 11), that "if there is no right to inflict it, "the guilt of blood must lie at the "door of the legislature, who mis-"interpret the extent of their war-"rant; and not at the door of the "subject, who is bound to receive "the interpretations that are given "by the sovereign power."

(*i*) It is on this ground that the penalty of death has been attached to many offences when committed by our soldiers and sailors on active service; as to which vide sup. vol. II. pp. 592, 597.

[men from offending, it never can follow from thence that it is lawful to deter them at any rate, and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. It is manifest that where the evil to be prevented is not adequate to the violence of the preventive, a ruler that thinks seriously can never justify such a law to the dictates of conscience and humanity. To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority. For life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of Him who gave it; either expressly revealed, or collected from the laws of nature or society, by clear and indisputable demonstration.

2. As to the *end*, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme Being; but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishment, fines, and temporary exile or imprisonment are inflicted: or by deterring others, by the dread of his example, from offending in the same way, "*ut pœna* (as Tully expresses it) *ad paucos, metus ad omnes perveniat*" (*j*); which gives rise to all ignominious punishments, and to such executions of justice as are open and public: or lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery or exile. The same one end of preventing future crimes, is endeavoured to be answered by each of these three modes of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be dis-

(*j*) Pro Cluentio, 46.

[abled from doing any future harm; and if the penalty fails of both these effects, (as it may do,) still the terror of his example remains as a warning to other citizens. The method, however, of inflicting punishment ought always to be proportioned to the particular purpose it was meant to serve, and by no means to exceed it; therefore the pains of death and of perpetual exile, slavery or imprisonment, ought never to be inflicted but where the offender appears incorrigible; which may be collected either from a repetition of minuter offences, or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment; and in such case it would be cruelty to the public to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps one of the worst of villanies.

3. As to the *measure* of human punishments. From what has been observed in the former articles, we may collect that the quantity of punishment can never be absolutely determined by any invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear best calculated to answer the end of precaution against future offences.

Hence it will be evident that what some have so highly extolled for its equity, the *lex talionis*, (or law of retaliation,) can never be, in all cases, an adequate or permanent rule of punishment. In some instances, indeed, it seems to be dictated by natural reason; as in the case of conspiracies to do an injury, or false accusations of the innocent (*k*). To which we may add the law of the Jews and Egyptians mentioned by Josephus and Diodorus Siculus, —that whoever, without sufficient cause, was found with any mortal poison in his possession, should himself be obliged to take it. But in general the difference of

(*k*) Pott. Ant. b. 1, c. 26.

[persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see that, if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may sometimes be too easy a sentence; as if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered, by decreeing, (in imitation of Solon's laws,) that he who struck out the eye of a one-eyed man, should lose both his own in return (*l*). Besides, there are very many crimes that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like; and we may add that those instances wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbour, and no more; but this correspondence between the crime and punishment, is a consequence from some other principle.] Murder is punished with death, as the appropriate manner of visiting an offence of the highest enormity, but not as an equivalent; for that would be expiation, and not punishment. [Nor is death always an equivalent for death; the execution of a needy decrepit assassin, is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours and his fortune. But the reason on which this sentence is grounded seems to be, that this is the highest penalty that man can inflict; and tends most to the security of mankind, by removing one mur-

(*l*) Pott. Ant. b. 1, c. 26.

[derer from the earth, and setting a dreadful example to deter others; so that even this grand instance proceeds upon other principles than those of retaliation.

We may remark that it was once attempted to introduce into England the law of retaliation, as a punishment for such only as preferred malicious accusations against others; it being enacted by stat. 37 Edw. III. c. 18, that such as preferred any suggestions to the king's great council, should put in sureties of taliation; that is, to incur the same pain that the other should have had, in case the suggestions were found untrue. But, after one year's experience, this punishment of taliation was rejected; and imprisonment adopted in its stead (*m*).

But though from what has been said, it appears that there cannot be any regular or determinate method of rating the quantity of punishment for crimes by any one uniform rule; but they must be referred to the will and discretion of the legislative power; yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting to it an adequate punishment.

As, first, with regard to the object of it; for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury; and of course, under this aggravation, the punishment should be more severe. Therefore treason, in conspiring the death of the sovereign, is made punishable with death, which is all that can be inflicted should any private subject be actually killed; and yet, generally, a design to transgress is not so flagrant an enormity as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking: so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it. And it is an encouragement to repentance and remorse, that it is never

(*m*) Stat. 38 Edw. 3, st. 1, c. 9.

[too late to retract; and that if a man stops even at the last stage of any crime, it is better for him than if he proceeds:] for which reason an attempt to commit an offence, is in general less severely punished than its actual perpetration. But in the case of a treasonable conspiracy, the object whereof is the sovereign, the bare intention, where there is any overt act, that is, anything in the conduct of the parties to prove that it was entertained by them, will deserve the highest degree of severity; not because the intention is equivalent to the act itself, but because the greatest rigour is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself (*n*).

Again: the violence of passion or temptation may sometimes alleviate a crime; as theft in case of hunger is far more worthy of compassion than when committed through avarice, or to supply the means of luxurious excesses. To kill a man upon sudden and violent resentment, is less penal than upon cool deliberate malice. The age, education, and character of the offender; the repetition, (or otherwise,) of the offence; the time, the place, the company wherein it was committed—all these, and a thousand other incidents, may aggravate or extenuate a crime (*o*).

[Further, as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures, those should be most severely punished which are the most destructive of the public safety and happiness (*p*). And among crimes of an equal malignity, those which a man has the most

(*n*) 4 Bl. Com. 15.

(*o*) Thus Demosthenes (in his oration against Midias) finely works up the aggravation of the insults he had received:—"I was abused," says he, "by my enemy in cold "blood, out of malice, not by heat "of wine, in the morning, pub- "licly before strangers, as well as "citizens; and that in the temple, "whither the duty of my office "called me."

(*p*) Beccar. c. 6.

[frequent and easy opportunities of committing; which cannot be so easily guarded against as others; and which, therefore, the offender has the strongest inducement to commit, according to what Cicero observes, "*ea sunt animadvertenda peccata maximè, quæ difficillimè præcaventur*" (*q*).]

Hence it is, that to steal a handkerchief or other trifle privately from the person of another has been considered more culpable than a more open theft, though of much greater value,—as of a load of corn, standing in a field. [And in the Isle of Man this rule was formerly carried so far, that to take away an ox or an ass was there no felony, but a trespass; because of the difficulty, in the little territory, to conceal them or carry them off; but to steal a pig or a fowl, (which is easily done,) was a capital crime, and the offender punishable with death (*r*).

Lastly, as a conclusion to the whole, we may observe, that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the *certainty* than by the *severity* of punishment (*s*). For the excessive severity of laws,—says Montesquieu (*t*)—hinders their execution:—when the punishment surpasses all measure, the public will frequently, out of humanity, prefer impunity to it. Thus, also, the stat. 1 Mary, sess. 1, recites in its preamble, "that the state "of every king consists more assuredly in the love of the "subject towards their prince than in the dread of laws "made with rigorous pains; and that laws made for "the preservation of the commonwealth, without great

(*q*) Pro Sexto Roscio, 40.
(*r*) 4 Inst. 285.
(*s*) Beccar. c. 7.
(*t*) Sp. L. b. 6, c. 13.

[" penalties, are more often obeyed and kept than laws " made with extreme punishments." Happy had it been for the realm, if the subsequent practice of that deluded princess, in matters of religion, had been correspondent to the sentiments of herself and parliament, in matters of state and government. We may further observe, that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished; —under the emperors severe punishments were revived— and then the empire fell.

It is, moreover, absurd and impolitic, to apply the same punishments to crimes of different malignity. A multitude of sanguinary laws, (besides the doubt that may be entertained concerning the right of making them,) do likewise prove a manifest defect in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind; yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which, through ignorance or indolence, he will not attempt to cure. It has been, therefore, ingeniously proposed, that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least (*u*); but if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction in the nature and gradations of punishment, the

(*u*) Beccar. c. 6.

[generality will be led to conclude there is no distinction in the guilt(*y*).]

(*y*) 4 Bl. Com. p. 18. Blackstone concludes these remarks with some just invectives on that frequency of capital punishment, which disgraced the English law at the time he wrote. He says "It is a melancholy "truth that among the variety of "actions which men are daily liable "to commit, no less than 160 have "been declared by act of parliament "to be felonies without benefit of "clergy, or, in other words, to be "worthy of instant death. So "dreadful a list, instead of di-"minishing, increases the num-"ber of offenders. The injured, "through compassion, will often "forbear to prosecute; juries, "through compassion, will some-"times forget their oaths, and "either acquit the guilty or miti-"gate the nature of the offence; "and judges, through compassion, "will respite one-half of the con-"victs, and recommend them to the "royal mercy. Among so many "chances of escape, the needy and "hardened offender overlooks the "multitude that suffer; he boldly "engages in some desperate at-"tempt to relieve his wants or "supply his vices; and if unex-"pectedly the hand of justice over-"take him, he deems himself pecu-"liarly unfortunate in falling at "last a sacrifice to those laws, "which long impunity has taught "him to contemn."

This exposure of the impolicy as well as inhumanity of our system in regard to punishment, might well have led to its earlier amendment. That reform, which is mainly due to the exertions of Sir Samuel Romilly towards the close of the reign of George the third, may now be said to be complete; but it owes its consummation to the reign of our present gracious sovereign.

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

[HAVING in the preceding chapter considered in general the nature of crimes and punishments, we are next led in the order of our distribution, to inquire what persons are not *capable* of committing crimes; or, which is the same thing, who are exempted from the censures of the law upon the commission of those acts which in other persons would be punished. In the process of which inquiry, we must have recourse to particular and special exceptions; for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

All the several pleas and excuses which protect the committer of a forbidden act, from the punishment which is otherwise annexed thereto, may be reduced to this single consideration,—the want or defect in *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act.] For though, *in foro conscientiæ*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet in general, and except in the rare

case in which the party confesses such a design, no human tribunal has any means of discovering its existence, where it has not been carried out into an external action. [It is besides impossible, in any case, to ascertain that conscience might not possibly have recovered its power in time to prevent the actual perpetration of the offence; for which reasons, in all temporal jurisdiction, an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

Now there are three cases in which the will does not join with the act. I. Where there is a defect of understanding. For where there is no discernment there is no choice; and where there is no choice there can be no act of the will, which is nothing else than a determination of one's choice to do or to abstain from a particular action; he therefore that has no understanding can have no will to guide his conduct. II. Where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, which is the case of all offences, committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees with it. III. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is so far from concurring with, that it loathes and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider the several species of defect in will, as they fall under some one or other of these general heads; as infancy, idiocy and lunacy, which fall under the first class; misfortune and ignorance, which may be referred

[to the second; and compulsion or necessity, which may properly rank in the third.

I. Under the first division we will first consider the case of *infancy* or non-age; which is a defect of the understanding. Infants under the age of discretion, ought not to be punished by any criminal prosecution whatever (*a*). What the age of discretion is, has been variously determined by various nations. The civil law distinguished the age of minors,—or those under twenty-five years old,—into three stages: *infantia*, from the birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, (or childhood,) was again subdivided into two equal parts; from seven to ten and a half, was *ætas infantiæ proxima:* from ten and a half to fourteen, was *ætas pubertati proxima.* During the first stage of infancy, and the next half stage of childhood, *infantiæ proxima*, minors were not punishable for any crime. During the other half stage of childhood, (approaching to puberty,) from ten and a half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief; but with many mitigations, and not with the utmost rigour of the law. During the last stage, (of the age of puberty, and afterwards,) minors were liable to be punished, as well capitally as otherwise (*b*).

The law of England does, in some cases, privilege an infant under the age of twenty-one, as to certain misdemeanors: and particularly in cases of omission, as in not repairing a bridge or a highway, or other similar offences (*c*); for not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery or the like (which

(*a*) Hawk. P. C. b. 1, c. 1, s. 2. Infancy, in reference to *civil* cases, has been treated of, sup. vol. II. pp. 302—308.

(*b*) Ff. 29, 5, 14, 50, 17, 111, 47, 2, 23.

(*c*) 1 Hale, P. C. 20, 21, 22.

[infants, when full grown, are at least as liable as others to commit,) or any perjury or cheating (*d*),—for these an infant above the age of fourteen is equally liable to punishment, as a person of the full age of twenty-one.

With regard to more heinous crimes our law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the antient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open (*e*). And from thence until fourteen, it was *ætas pubertati proxima*, in which the infant might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion; but, under twelve it was held that he could not be guilty in will, neither after fourteen could be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old, may have as much cunning as another at fourteen; and in these cases our maxim is that "*malitia supplet ætatem.*" Under seven years of age, indeed, an infant cannot be guilty of an indictable offence (*f*); for then a criminal discretion is almost an impossibility in nature. Also, above seven and under fourteen, though an infant shall be *primâ facie* adjudged to be *doli incapax* (*g*), yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and (in case of murder) be sentenced to suffer death. Thus, besides more antient examples, there

(*d*) Bac. Ab. Infancy, H.

(*e*) Wilk. Leg. Ang.-Sax. LL. Athelstan.

(*f*) Mir. c. 4, s. 16; 1 Hal. P. C. 27; Dalt. Just. c. 147. See Marsh *v.* Loader, 14 C. B., N. S. 535.

(*g*) See R. *v.* Owen, 4 C. & P. 236.

[was an instance where a boy of eight years old was tried in the seventeenth century at Abingdon for firing two barns (an offence at that time capital); and it appearing that he had malice, cunning, and revenge, he was found guilty, condemned, and hanged accordingly (*h*). Thus also, in still later times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment (*i*). But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction (*k*).] After an infant has attained fourteen, he is presumably *doli capax*, and has no privilege by reason of his non-age, except in cases of omission and the like, as already noticed (*l*)—and at twenty-one, when infancy ceases, no privilege whatever in respect of age is recognized by law.

[Another case in which the defect of understanding excuses from guilt, is that of an *idiot* or a *lunatic;* for the rule of law as to the latter (which may be easily adapted also to the former) is, that "*furiosus furore solum punitur*" (*m*). In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself (*n*). Also, by the common law if a man in his sound memory commits a capital offence, and, before arraign-

(*h*) Emlyn on 1 Hal. P. C. 23.

(*i*) Foster, 72.

(*k*) Of the particular crime of *rape*, an infant under the age of fourteen cannot be convicted; and here, therefore, the doctrine *malitia supplet ætatem* does not apply.

(*l*) Vide sup. p. 23.

(*m*) As to the state of the law relative to idiots and lunatics in general, vide vol. I. p. 471; vol. II. pp. 509—515.

(*n*) 3 Inst. 6.

[ment becomes mad, he ought not to be arraigned for it; because he is not able to plead with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution (*p*).] And special provisions, of the same tendency, are now made by statute; for by 39 & 40 Geo. III. c. 94, it is enacted, that if a person charged with any offence be brought up to be discharged for want of prosecution, and appear to be insane, the court may order a jury to be impanelled to try the sanity; and, if they find him insane, may order him to be kept in custody till the pleasure of the Crown be known;—that if a person indicted for any offence appear insane, the court may (on his arraignment) order a jury to be impanelled to try the sanity; and if they find him insane, may order the finding to be recorded, and the insane person to be kept in like manner; and that if, upon the trial for treason, murder or felony, insanity at the time of committing the offence is given in evidence, and the jury acquit, they must be required to find specially, whether he was insane at the time of the commission of the offence, and whether he be acquitted on that account; and if they find in the affirmative, the court may order him to be kept in like manner, till the Crown's pleasure be known (*q*). Moreover, by 27 & 28 Vict. c. 29 (*r*), if any person confined in prison

(*p*) 1 Hale, P. C. 34.

(*q*) As to asylums for *criminal lunatics*, see 23 & 24 Vict. c. 75, amended by 30 & 31 Vict. c. 12. See also 14 & 15 Vict. c. 81, as to the removal to England, and confinement there, of persons tried in India, and acquitted on the ground of insanity.

(*r*) By this Act a previous statute on the same subject, 3 & 4 Vict. c. 54, was in part repealed.

under any charge or sentence (whether of *death* or of lighter degree) shall appear to be insane, and that fact be duly certified to a secretary of state, he may direct two or more physicians or surgeons to inquire into the alleged insanity; and if they shall find him to be insane, and certify accordingly, may issue his warrant to convey such person to the proper asylum for the reception of such insane persons.

[It is true that in the bloody reign of Henry the eighth, a statute was made, which enacted that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory (*s*). But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M. c. 10. For, as is observed by Sir Edw. Coke (*t*), "the execution of an offender is by way of example, *ut pœna ad paucos, metus ad omnes perveniat;*" but so it is not when a madman is executed: but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be of no example to others.]

On the other hand, however, it is not every kind or degree of insanity, that will exempt a man from responsibility for his acts; and it may be laid down in general, that a partial unsoundness of mind will be no excuse. "It is very difficult, indeed," as Lord Hale observes, "to "define the invisible line that divides perfect and partial "insanity; but it must be duly weighed and considered "both by the judge and jury, lest on the one side there be "a kind of inhumanity towards the defects of human "nature, or on the other side too great an indulgence "given to great crimes" (*u*). The line of distinction re-

(*s*) 33 Hen. 8, c. 20.

(*t*) 3 Inst. 6.

(*u*) Some of the principal cases in which the defence of unsoundness of mind, in criminal charges, has been been discussed, are Arnold's case, 16 St. Tr. by Howell, 764; Lord Ferrers' case, 19 ib. 947; Hadfield's case, Collinson on Lun. 480; Parker's case, ib. 477; Bowler's case, ib. 673; Bellingham's case, ib. Addend. 636; Of-

ferred to by Hale, has never yet been fully traced. The judges in a modern case, however, gave it as their opinion (*x*), that if a man who takes another's life appears to have known at the time that he was acting contrary to law, his being under an insane delusion that he was thereby redressing some supposed grievance or producing some public benefit, will not exempt him from the guilt of murder;

ford's case, 5 C. & P. 168; Oxford's case, 9 C. & P. 533; R. v. Higginson, 1 C. & K. 129; and Macnaughten's case, 10 Cl. & Fin. 200.

(*x*) This opinion was given in answer to certain questions propounded to the judges by the House of Lords, in reference to the discussion in that house occasioned by Macnaughten's case, in the year 1843. On the same occasion the judges said, that the question that has been generally left to the jury in cases of this description is, whether the accused at the time of doing the act *knew the difference between right and wrong;* but that the more correct question is, whether he *had a sufficient degree of reason to know that he was doing an act that was wrong.* Upon this subject the Report of the Criminal Code Bill Commission has the following remarks (p. 17): "The obscurity "which hangs over this subject "cannot be altogether dispelled "until our existing ignorance as "to the nature of the will and "the mind, the nature of the or-"gans by which they operate, the "manner and degree in which "those operations are interfered "with by disease, and the nature "of the diseases which interfere "with them, are greatly dimin-"ished. Much latitude must in "any case be left to the tribunal "which has to apply the law to "the facts in each particular case." And again: "It must be borne in "mind that although insanity is a "defence which is applicable to "any criminal charge, it is most "frequently put forward in trials "for murder, and for this offence "the law—and we think wisely—"awards upon conviction a fixed "punishment, which the judge has "no power to mitigate. In the "case of any other offence, if it "should appear that the offender "was afflicted with some unsound-"ness of mind, but not to such a "degree as to render him irrespon-"sible—in other words, where the "criminal element predominates, "though mixed in a greater or "lesser degree with the insane ele-"ment—the judge can apportion "the punishment to the degree of "criminality, making allowance "for the weakened or disordered "intellect. But in a case of mur-"der, this can only be done by an "appeal to the executive; and we "are of opinion that this difficulty "cannot be successfully avoided by "any definition of insanity which "would be both safe and practic-"able, and that many cases must "occur which cannot be satisfac-"torily dealt with otherwise than "by such an appeal."

neither will he be exempted by being under an insane delusion as to *facts;* provided the supposed facts, if real, would not have justified the act; but that, on the other hand, he will be exempted by such delusion as last mentioned, where the facts, if real, would have justified the act.

[Again: as to artificial, voluntarily contracted madness by *drunkenness* or intoxication, which depriving men of their reason, puts them in a temporary phrenzy,—our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour. "A "drunkard," says Sir Edward Coke, "who is *voluntarius* "*dæmon*, hath no privilege thereby; but what hurt or ill "soever he doth, his drunkenness doth aggravate it: *nam* "*omne crimen ebrietas et incendit et detegit*" (*y*). It hath been observed that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence which may be necessary to make the blood move in Norway, would make an Italian mad. "A "German, therefore," says the President Montesquieu, "drinks through custom, founded upon constitutional "necessity; a Spaniard drinks through choice, or out of "the mere wantonness of luxury; and drunkenness," he adds, "ought to be more severely punished, where it makes "men mischievous and mad, as in Spain and Italy, than "where it only renders them stupid and heavy, as in "Germany and more northern countries" (*z*). And accordingly, in the warm climate of Greece, a law of Pitacus enacted, "that he who committed a crime, when drunk, "should receive a double punishment: one for the crime "itself, and the other for the ebriety which prompted him "to commit it" (*a*). The Roman law, indeed, made great allowances for this vice: "*per vinum delapsis capitalis pœna*

(*y*) 1 Inst. 247.
(*z*) Sp. L. b. 14, c. 10.
(*a*) Puff. L. b. 8, c. 3.

[*remittitur*" (*b*). But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another (*c*).

II. Another deficiency of will is, where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not cooperate with the deed: which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter: at present only observing, that if any accidental mischief happens to follow from the performance of any *lawful* act with due caution, the party stands excused from all guilt (*d*).] But if a man, by doing anything *unlawful*, (at least if it be *malum in se*, and not merely *malum prohibitum*,) or by doing anything lawful but without due caution,—produce an injurious result to another which he did not foresee or intend, his want of foresight shall be no excuse, but he is criminally guilty of whatever consequence may follow.

[*Ignorance* or *mistake* is another defect of will; when a man intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake in fact, and not an error in point of law. As if a man, intending to kill a burglar in his own house, by mistake kills one of his own family, this is no criminal action (*e*): but if a man think he has a right to kill a person excommunicated or outlawed wherever he shall meet him, and does so, this is wilful murder. For a mistake in point of law which every person of discretion not only

(*b*) Ff. 49, 16, 6.

(*c*) See Beverley's case, 4 Rep. 125; Reniger *v.* Fogossa, Plow. 19; R. *v.* Carroll, 7 C. & P. 145; Criminal Code Bill Commission Report, p. 18.

(*d*) 1 East, P. C. c. 5, s. 36.

(*e*) Cro. Car. 538; 1 Hale, P. C. 42.

[may, but is bound and presumed to know, is in criminal cases no sort of defence. "*Ignorantia juris, quod quisque tenetur scire, neminem excusat*" (*f*), is as well the maxim of our own law as it was of the Roman (*g*).

III. A third kind of defect of will is, that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God hath given to man, it is just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion (*h*).

Of this nature, in the first place, is the obligation of *civil subjection;* whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiæ*, or whether the inferior in this case is not bound to obey the Divine rather than the human law, it is not our business to decide; though the question, perhaps, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being, is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff who burnt Latimer and Ridley in the bigoted days of Queen Mary, was not liable to punishment from

(*f*) See R. *v.* Bailey, R. & R. C. C. 1.

(*g*) See Ff. 22, 6, 9; Plowd. 343; 1 Hale, P. C. 42. It has even been held, that it is no defence for a foreigner charged with a crime committed in England, to allege that he did not know he was doing wrong,—and this though the act with the commission of which he is charged is not criminal in his own country. (R. *v.* Esop, 7 C. & P. 456.)

(*h*) Some interesting remarks upon this head, will be found in the Report of the Criminal Code Bill Commission, p. 10, note A.

[Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution.

As to persons in private relations, the principal case where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband. For, though neither a son, nor a servant, are excused for the commission of any offence by the command or coercion of the parent or master (*j*), yet in some cases, the command or authority of her husband, either express or implied, will privilege a wife from punishment, even for heinous crimes. Thus, if a woman commit theft, burglary or other offences against the laws of society, by the coercion of her husband; or even in his company, which the law construes a coercion; she is not held to be guilty of any crime, being considered as acting by compulsion and not of her own will (*k*): a doctrine which is at least a thousand years old in this kingdom, being to be found among the laws of King Ina, the West Saxon (*l*). And it appears that among the northern nations on the Continent, this privilege extended to any woman transgressing in concert with a man, and to any slave that committed a joint offence with a freeman: the male or freeman only being punished, the female or slave dismissed: "*proculdubio quod alterum libertas, alterum necessitas, impelleret*" (*m*). But, (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters,) even with regard

(*j*) Hawk. P. C. b. 1, c. 1, s. 14; 1 Hale, P. C. 44, 516.

(*k*) As to this doctrine, see R. *v.* Price, 8 Car. & P. 19; R. *v.* Cruse, ib. 541; R. *v.* Brooks, 22 L. J. (M. C.) 121; R. *v.* Smith, 27 ib. p. 204; R. *v.* Wardroper, 29 ib. p. 116.

(*l*) Cap. 57; Wilk. 29. It may be noticed that the Report of the Criminal Code Bill Commission, recommends the abolition of the presumption as to the coercion of married women by their husbands (p. 18).

(*m*) Stiern. de Jure Sueon. l. 2, c. 4.

[to wives the rule is liable to exception in the case of murder, manslaughter and the like,—these offences being of too deep a dye to be thus excused (*n*). In treason, also, (the highest crime which a member of society can, as such, be guilty of,) no plea of coverture shall excuse the wife—no presumption of her husband's coercion shall extenuate her guilt (*o*). And this, as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself, as a subject, has forgotten to pay. In misdemeanors, also, we may here remark another exception to the general rule, viz., that a wife may be indicted *with* her husband for keeping a brothel. For this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex (*p*). And in all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any *feme sole*.

Another species of compulsion or necessity is what our law calls *duress per minas* (*q*); that is, threats and menaces, which induce a fear of present death or other grievous bodily harm, and which take away the guilt of many crimes and misdemeanors—at least before the human tribunal (*r*). And, therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace (*s*).] Duress *per minas* is not, however, an excuse in every case, for though a man be desperately assaulted and threatened with death, and

(*n*) 1 Hale, P. C. 45, 47, 48, 516; Hawk. P. C. b. 1, c. 1, s. 11; Keyl. 31.

(*o*) 1 Hale, P. C. 47.

(*p*) Hawk. P. C. b. 1, c. 1, s. 12.

(*q*) Vide sup. vol. I. p. 139.

(*r*) Fost. 14, 216; see R. *v.* Tyler, 8 C. & P. 616.

(*s*) R. *v.* Tyler, ubi sup.; 1 Hale, P. C. 51.

cannot otherwise escape than by consenting to kill an innocent person then present,—this will not acquit him of murder if he commits the act; for he ought rather to die himself than kill an innocent person (*t*). But in such a case, he is permitted to kill the assailant; for there the law of nature and self-defence, its primary canon, have made him his own protector. It is to be observed, too, that the compulsion which takes away guilt must be the fear of no less than present death or grievous bodily harm (*u*); for the mere apprehension of having houses burnt or goods spoiled, is not sufficient (*x*). It must also be a just and well-grounded fear—"*qui cadere posset in virum constantem, non timidum et meticulosum*," as Bracton expresses it, in the words of the civil law (*y*).

[There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which, without such obligation, would be criminal. This is, when a man has his choice of two evils set before him, and being under a necessity of choosing one, he chooses the least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity where a man is required by the law to arrest another, or to disperse a riot, and resistance is made to his authority. It is here justifiable and even necessary to beat, or wound, or perhaps to kill, the offenders, rather than permit an escape, or the riot to continue (*z*).

There is yet another case of necessity, which has occasioned great speculation among the writers upon general

(*t*) 1 Hale, P. C. 51. As to this "stern rule," see Report of Criminal Code Bill Commission, p. 10, Note A.

(*u*) Bract. l. 3, tr. 1, c. 4; Co. Litt. 162 a, 253 b; 2 Inst. 483; Fost. 14, 216; R. *v.* Southerton, 6 East, 149.

(*x*) Bract. ubi sup.

(*y*) Ib.; Ff. 4, 2, 5, 6.

(*z*) 1 Hale, P. C. 51.

[law; viz. whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities? And this both Grotius and Puffendorf, together with many other of the foreign jurists, hold in the affirmative; maintaining, by many ingenious, humane, and plausible reasons, that in such cases the community of goods, by a kind of tacit concession of society, is revived. And some even of our own lawyers have held the same, though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians (*a*); at least it is now antiquated, the law of England admitting no such excuse at present (*b*). And this its doctrine is agreeable, not only to the sentiments of many of the wisest of the antients, particularly Cicero (*c*), who holds that "*suum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum*," but also to the Jewish law, as certified by King Solomon himself (*d*)—"If a thief steal to satisfy his soul "when he is hungry," he shall restore sevenfold, and "shall give all the substance of his house:" which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no one can possibly be an adequate judge, but the party himself who pleads them. In this country, especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by Baron

(*a*) De Jure B. et P. l. 2, c. 2; L. of Nat. and N. l. 2, c. 6.

(*b*) See Britt. c. 10; Mirr. c. 4, s. 16; 1 Hale, P. C. 54. The Report of the Criminal Code Bill Commission (p. 10, Note A.) notices that Lord Hale admits the general rule to be subject to some exceptions,—as, for instance, in the seizure of private stores of provisions by the master in the case of shipwreck.

(*c*) De Off. l. 3, c. 5.

(*d*) Prov. vi. 30.

[Puffendorf, and whereon he builds his principal arguments; which, however they may hold elsewhere, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the necessitous; especially when we consider that the sovereign, on the representation of the ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship: an advantage which is wanted in many states, particularly those which are democratical; and these have in its stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigour. But the founders of our constitution thought it better to vest in the Crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

To these several cases in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person: which extend as well to the will as to the other qualities of the mind. It is the case of the *sovereign*, who by virtue of the royal prerogative is not under the coercive power of the law: which will not suppose him capable of committing a folly, much less a crime (*e*). We are, therefore, out of reverence and decency, to forbear any idle inquiries of what would be the consequence if the sovereign were to act thus and thus: since the law deems so highly of his wisdom and virtue as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and, therefore, has made no provision to remedy such a grievance. But of this sufficient was said in a former division of this work, to which we must refer the reader (*f*).]

(*e*) 1 Hale, P. C. 44.

(*f*) Vide sup. vol. II. p. 479.

CHAPTER III.

OF PRINCIPALS AND ACCESSORIES.

[It having been shown in the preceding chapter what persons are not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending; viz. as *principal* and *accessory*.

I. A man may be *principal* in an offence, in two degrees. A principal in the first degree is he that is the actor or absolute perpetrator of the crime: and, in the second degree, he who is present aiding and abetting the fact to be done (*a*). Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance (*b*). And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it who is ignorant of its poisonous quality, or giving it to him for that purpose (*c*);

(*a*) 1 Hale, P. C. 615. See R. *v.* Howell, 9 Car. & P. 437.

(*b*) Foster, 350. In the case of *rape*, if the prisoner was present aiding and abetting, he may be charged as principal, either in the first or the second degree. (R. *v.* Crisham, 1 Car. & M. 187.) A principal in the second degree in larceny, cannot be convicted as a *receiver*. Queen *v.* Perkins, 21 L. J. (M. C.) 152.

(*c*) Kel. 52; Foster, 349.

[and yet not administer it himself, nor be present when the very deed of poisoning is committed (*d*); and the same reasoning will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief; or exciting a madman to commit murder, so that death thereupon ensues; in every of these cases the party offending is guilty of murder, as a principal in the first degree. For he cannot be called an accessory, that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty, either as principal or accessory, and cannot be so as accessory, it follows that he must be so as principal; and, if principal, then in the first degree: for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist (*e*).] It is to be observed, however, that though the law makes the distinction between principals in the first and in the second degree, yet in general the punishment inflicted upon either class of offenders is the same (*f*).

II. [An *accessory* is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt, we will first examine what offences admit of accessories, and what not; secondly, who may be an ac-

(*d*) 3 Inst. 138; 1 Hale, P. C. 616; Hawk. P. C. b. 2, c. 29, s. 11.

(*e*) 1 Hale, P. C. 617; Hawk. ubi sup.

(*f*) See, in particular, the following enactments: 24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 99, s. 35; c. 100, s. 67; in reference to the felonies punishable under those Acts respectively.

[cessory *before* the fact; thirdly who may be an accessory *after* it; and, lastly, how accessories, considered merely as such, and distinct from principals, are to be treated.

1. And, first, as to what offences admit of accessories, and what not. In treason there are no accessories, but all are principals: the same acts that make a man accessory in felony, making him a principal in treason, upon account of the heinousness of the crime (*g*). Besides, it is to be considered, that the bare attempt to commit treason is many times actual treason: as imagining the death of the sovereign, or conspiring to take away his crown. And as no one can advise or abet such a crime without an intention to have it done, there can be no accessories before the fact; since the very advice and abetment amount to principal treason. In murder or other felonies, there may be accessories; except only in those offences which by judgment of law are sudden and unpremeditated, as manslaughter and the like; which therefore cannot have any accessories *before* the fact (*h*). So, too, in all crimes under the degree of felony, there are no accessories either *before* or *after* the fact; but all persons concerned therein, if guilty at all, are principals (*i*); the same rule thus holding with regard to the highest and lowest offences, though upon different reasons. In treason all are principals, *propter odium delicti;* in misdemeanors all are principals, because the law, which *de minimis non curat*, does not descend to distinguish the different shades of guilt in crimes below the degree of felony.

2. As to the second point, who may be an accessory

(*g*) 3 Inst. 138; 1 Hale, P. C. 613. As to the crime of treason, vide post, c. VI.

(*h*) 1 Hale, P. C. pp. 615, 616; Evans' case, Foster, 73. But see Reg. *v.* Gaylor, 1 D. & B. (C. C.) 288.

(*i*) Hale, ubi sup.; see Moland's case, 2 Moody, C. C. R. 276; Queen *v.* Greenwood, 21 L. J. (M. C.) 127. In accordance with this rule, the 24 & 25 Vict. c. 94, s. 8, declares that "whosoever shall aid, abet, "counsel, or procure the commission of any misdemeanor, shall "be liable to be indicted, tried and "punished as a principal offender."

[*before* the fact: Sir Matthew Hale defines him to be one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime (*k*). Herein absence is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal (*l*). If A. then advises B. to kill another, and B. does it in the absence of A.; now B. is principal and A. is accessory to the murder. And this holds, even though the party killed be not *in rerum naturâ* at the time of the advice given. As, if A., the reputed father, advises B., the mother of a bastard child, unborn, to strangle it when born, and she does so; A. is accessory to this murder (*m*). And it is also settled, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact (*n*).] It is likewise a rule, that he who in anywise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act, supposing at least that it was a probable consequence thereof, but not otherwise (*o*). As if A. advises B. to rob C., and B. does so accordingly, and on resistance made *kills* C., B. is guilty of murder as principal, and A. as accessory (*p*). [But if A. commands B. to burn C.'s house, and he, in so doing, commits a robbery; now A., though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature (*q*). But if the felony committed be the same in

(*k*) 1 Hale, P. C. 615, 616. See 24 & 25 Vict. c. 94, s. 2; The Queen *v.* Gregory, Law Rep., 1 C. C. R. 77.

(*l*) See R. *v.* Jordan, 7 Car. & P. 432; R. *v.* Tuckwell, 1 Car. & Mar. 215.

(*m*) Dyer, 186.

(*n*) Foster, 125.

(*o*) This qualification of the rule will be found in Fost. 370. (And see 1 Hale, P. C. 617.) And it seems that in reason it must be so qualified.

(*p*) Fost. ubi sup. Blackstone, vol. iv. p. 37 (after Hale), puts the case of A. commanding B. to beat C., and B. beating him so that he dies. But this alone would perhaps not suffice to make A. accessory to the murder.

(*q*) Hawk. P. C. b. 2, c. 29, s. 22.

[substance with that which is commanded, and only varying in some circumstantial matters;—as if upon a command to poison Titius, he is stabbed or shot, and dies;—the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance (*r*).

3. An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts or assists the felon (*s*). Therefore, to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed, and that it was committed by the party in question (*t*). In the next place he must receive, relieve, comfort or assist the criminal. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his pursuers, a house or other shelter to conceal him, or open force and violence to rescue or protect him (*u*). So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony (*x*).] But to buy or receive stolen goods, knowing them to be stolen, does not fall within the definition of this offence; and at common law, such receiving was a misdemeanor only, because the offender received the *goods* only and not the *felon* (*y*). But this offence (as we shall see in the appropriate place) is now differently treated (*z*).

[The felony must be complete at the time of the assistance given, else it makes not the assistor an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or re-

(*r*) Hawk. P. C. b. 2, c. 29, s. 20.
(*s*) 1 Hale, P. C. 618.
(*t*) Hawk. ubi sup. s. 32.
(*u*) Ib. ss. 26, 27, 28.
(*x*) See 28 & 29 Vict. c. 126, ss. 37—40.
(*y*) 4 Bl. Com. p. 38.
(*z*) As to receiving stolen goods, vide post, c. v.

[ceives the delinquent, this does not make him accessory to the homicide; for till death ensues there is no felony committed (*a*). But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband receives his wife, who have any of them committed a felony, the receivers become accessories *ex post facto* (*b*). But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion; and therefore she is not bound, neither ought she, to discover her lord (*c*).

4. The last point of inquiry is, how accessories are to be treated, considered distinct from principals: and the general rule of the antient law,—borrowed from the Gothic constitutions,—is this, that accessories shall suffer the same punishment as their principals (*d*): if one be liable to death, the other is also liable; as by the laws of Athens, delinquents and their abettors were to receive the same punishment (*e*).] With which, as regards accessories *before* the fact, the modern rule is strictly consonant; for, by 24 & 25 Vict. c. 94, s. 1, all these are to be indicted, tried, convicted, and punished in all respects as if they were principal felons (*f*). [Why then, it may be asked, are

(*a*) Hawk. P. C. b. 2, c. 29, s. 35.

(*b*) 3 Inst. 108; Hawk. ubi sup. s. 34.

(*c*) See 1 Hale, P. C. 47, 621; Reg. *v.* Good, 1 Car. & K. 185. So also a wife cannot be indicted for *receiving* goods stolen by her husband. (Reg. *v.* Brooks, 22 L. J. (M. C.) 121.) As to the doctrine of the wife's coercion by her husband, vide sup. p. 32.

(*d*) See Stiern. de Jure Goth. l. 3, c. 5.

(*e*) Pott. Antiq. b. 1, c. 26.

(*f*) This provision is a re-enactment of 11 & 12 Vict. c. 46, s. 1 (repealed by 24 & 25 Vict. c. 95). See also 24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 99, s. 35; c. 100, s. 67, in reference to the particular felonies punishable under those Acts, respectively. It is remarked in the Report of the Criminal Code Bill Commission (p. 19) that the old law as to principal and accessory was "practically

[such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment?

For these reasons: 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself; the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2. Because, though accessories before the fact are treated as principals, yet accessories *after* the fact are usually punished with less severity (*g*). 3. Because, formerly, no man could be tried as accessory till after the principal was convicted, or, at least, he must have been tried at the same time with him; though that rule is now wholly abolished (*h*). 4. Because if a man be indicted as accessory, and acquitted, he may afterwards

"superseded" by the enactment referred to in the text.

(*g*) Accessories *after* the fact to any felony, are in general punishable with imprisonment not exceeding two years, with or without hard labour; and they may also be required to find security to keep the peace, or, in default, to suffer an additional imprisonment to the extent of one year. (See 24 & 25 Vict. c. 94, s. 4.) But accessories after the fact *to murder* are punishable by penal servitude for life, or not less than five years, (see 24 & 25 Vict. c. 100, s. 67, and 27 & 28 Vict. c. 47,) or to imprisonment with or without hard labour to the extent of two years. It is the opinion of Blackstone (vol. iv. p. 39), that "if a distinction were constantly to be made between the punishments of principals and accessories even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices by reason of the difference of his punishment." And he cites Beccaria, c. 37, in support of this doctrine.

(*h*) 1 Hale, P. C. 623; Fost. 363. By 24 & 25 Vict. c. 94 (re-enacting in substance 11 & 12 Vict. c. 46, ss. 1, 3), any accessory, either *before* or *after* the fact, may be indicted and convicted, either as such accessory together with the principal felon, or after his conviction: or may be indicted and convicted of a substantive felony, whether the principal felon shall have been convicted or not, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as an accessory before or after the fact, (if convicted as an accessory,) may respectively be punished. (24 & 24 Vict. c. 94, ss. 1, 2, 3.) See The Queen *v.* Richards, Law Rep., 2 Q. B. D. 311.

[be indicted as principal; for an acquittal of receiving or counselling a felon, is no acquittal of the felony itself. On the other hand, it was formerly a matter of some doubt, whether, if a man were acquitted as principal, he could afterwards be indicted as accessory before the fact, since those offences are frequently very near allied; and therefore an acquittal of the guilt of one may be an acquittal of the other also (*i*). But that doubt has been since overruled (*k*); and it has always been clearly held, that one acquitted as principal may be indicted as accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons, the distinction of principal and accessory will appear to be necessary; though the punishment of principals and of accessories before the fact is the same.]

(*i*) 1 Hale, P. C. 625, 626; Hawk. P. C. b. 2, c. 35, s. 11.

(*k*) See R. *v.* Birchenough, 1 M. C. C. R. 477; R. *v.* Parry, 7 C. & P. 836.

CHAPTER IV.

OF OFFENCES AGAINST THE PERSON AND REPUTATION.

WE are now to enter, in pursuance of the distribution before laid down, upon an account of the several species of crimes and misdemeanors, with the punishments annexed to each (*a*).

And here we shall pursue in general, and so far as the nature of our criminal law permits, the same arrangement which we adopted for the illustration of the law relative to civil injuries (*b*): and shall, consequently, be led to treat —first, of offences against the *persons* of individuals; secondly, against their *property;* and thirdly, against those *public rights* which belong in common to all the different members of the commonwealth.

First, then, with respect to those crimes which affect the persons of individuals.

[Were such offences as these, and such as are committed against the property of individuals, confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured; the manner of obtaining which was the subject of our inquiries in the preceding volume. But the wrongs of which we are now to treat are of a much more extensive consequence; in the first place, because they are all considered as contempts of public justice, or (what is the same thing) of the Crown which is the fountain of that

(*a*) Vide sup. p. 1. (*b*) Vide sup. bk. v. c. VII.

[justice: secondly, because they include in them, almost always, a breach of the public peace: and, lastly, because, by their example and evil tendency, they threaten and endanger the subversion of all civil society. Upon these accounts it is, that, besides the private satisfaction due and given in many cases to the individual by action for the private wrong, the Government also calls upon the offender to submit to public punishment for the public crime; and the prosecution of these offences is always at the suit and in the name of the sovereign; in whom, by the tenure of our constitution, the *jus gladii*, or executory power of the law, entirely resides. Thus, too, in the old Gothic constitution, there was a threefold punishment inflicted on all delinquents: first, for the private wrong to the party injured; secondly, for the offence against the sovereign by disobedience to the laws; and, thirdly, for the crime against the public by their evil example. Of which we may trace the groundwork in what Tacitus tells us of his Germans; that, whenever offenders were fined, "*pars mulctæ regi, vel civitati, pars ipsi, qui vindicatur, vel propinquis ejus, exsolvitur*" (*c*).

Of crimes injurious to the *persons* of private subjects the principal and most important is the offence of taking away life, which is the immediate gift of the great Creator; and of which, therefore, no man can be entitled to deprive either himself or another, except in some manner either expressly commanded in, or evidently deducible from, those laws, which the Creator has given us—the Divine laws of either nature or revelation.] The first offence, therefore, to be discussed in the present chapter will be that of—

I. *Homicide*, (or destroying the life of man,) in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

Now homicide, or the killing of any human creature, is either *free from legal guilt*,—the circumstances being such

(*c*) De Mor. Germ. c. 12.

as to render it *justifiable*, or at least *excusable;* or else it is *felonious* (*d*).

1. Justifiable homicide is of divers kinds. First, such as is occasioned by the due *execution of public justice*, in putting a malefactor to death who has been tried and sentenced to suffer that punishment. [This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore, wantonly to kill the greatest of malefactors, deliberately, uncompelled and extrajudicially, is murder (*e*). For, as Bracton very justly observes, "*istud homicidium, si fit ex "livore, vel delectatione effundendi humanum sanguinem, licet "justè occidatur iste, tamen occisor peccat mortaliter, propter "intentionem corruptam*" (*f*). And, further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder (*g*). And, upon this account, Sir Matthew Hale himself, though he accepted the place of a judge of the Common Pleas under Cromwell's government, (since it is necessary to decide the disputes of civil property even in the worst of time,) yet declined to sit on the Crown side at the assizes or to try prisoners, having very strong objections to the legality of the usurper's commission (*h*); a distinction, perhaps, rather too refined, since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property. Also such judgments, when legal, must be executed by the proper officer or his appointed deputy: for no one else is *required* by law to carry it out; which requisition it is, that justifies the

(*d*) Blackstone describes homicide (vol. iv. p. 177) as of three kinds: *justifiable*, *excusable* and *felonious;* and this accords with the division of Hawkins; but there appears, under the existing law, to be no practical distinction between justifiable and excusable homicide (vide post, p. 56).

(*e*) 1 Hale, P. C. 497.

(*f*) L. 3, tr. 2, c. 4.

(*g*) Hawk. P. C. b. 1, c. 28, s. 5; Hale, ubi sup.

(*h*) See Burnet's Life of Sir M. Hale.

[homicide. If another person should execute the criminal of his own head, it is held to be murder (*i*), even though it be the judge himself (*k*). It must, further, be executed *servato juris ordine*—it must pursue the sentence of the court. If an officer should behead one who is adjudged to be hanged, or *vice versâ*, it is murder; for he is merely ministerial, and, therefore, only justified when he acts under the authority and compulsion of the law. But if he changes one kind of death for another, he then acts by his own authority; which extends not to the commission of homicide otherwise than as according to the sentence; and besides, such licence might occasion a very gross abuse of his power.] The sovereign, indeed, may remit part of a sentence; for example, in the case of *treason*, the peculiar severities with which the sentence of death used to be accompanied, were in modern times often remitted; but such exercise of mercy was not (it will be observed) an introduction of a different punishment from that authorized by the law, but only a relaxation of it from motives of humanity (*l*).

Secondly, justifiable homicide may be committed for the *advancement of public justice;* as in the following instances: 1. Where a peace officer or his assistant, in the due execution of his office, arrests or attempts to arrest one who resists, and who is consequently killed in the struggle (*m*); 2. Where, in case of a riot or rebellious assembly, such officers or their assistants kill any of the mob, in the endeavour to disperse them; which is justifiable both at common law and by the Riot Act, 1 Geo. I. c. 5 (*n*); 3. Where the prisoners in a gaol assault the gaoler or officer, and he in his defence kills any of them; which is justifiable, for the sake of preventing an escape (*o*); 4. Where an officer or his assistant, in the due execution

(*i*) 1 Hale, P. C. 501; Hawk. P. C. b. 1, c. 28, s. 9.

(*k*) Dalt. Just. c. 150.

(*l*) See 4 Bl. Com. p. 92; 3 Inst. 52, 212.

(*m*) Foster, 270, 309; 1 Hale, P. C. 494.

(*n*) 1 Hale, P. C. 495; Hawk. P. C. b. 1, c. 65, ss. 11, 12.

(*o*) 1 Hale, P. C. 496.

of his office, arrests or attempts to arrest a party for felony, and the party having notice thereof flies, and is killed by such officer or assistant in the pursuit (*q*); 5. Where, upon such offence as last described, a *private* person in whose sight it has been committed, arrests or endeavours to arrest the offender; and kills him in resistance or flight, under the same circumstances as above mentioned with regard to an officer (*r*). [But in all these cases, there must be an apparent necessity—that is, it must be shown that the party could not be otherwise secured, the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide was committed: otherwise, without such absolute necessity, it is not justifiable.

Thirdly, such homicide as is committed for the *prevention of any forcible and atrocious crime* (*s*), is justifiable by the law of nature (*t*); and also by the law of England as it stood so early as at the time of Bracton (*u*), and as it stands at the present day (*x*).] If any person attempts the robbery or murder of another, or attempts to break open a house *in the night time*, and shall be killed in such attempt, either by the party assaulted, or the owner of the house, or the servant attendant upon either, or by any other person present and interposing to prevent mischief, the slayer shall be acquitted and discharged (*y*). This reaches not to any crime unaccompanied with force,—as, for example, the picking of pockets; nor to the breaking open

(*q*) Fost. p. 271. See The Queen *v.* Dodson, 20 L. J. (M. C.) 57.

(*r*) Fost. ubi sup.; 2 Hale, P. C. 77, 82. As to the killing by a private person who arrests on suspicion only, and is resisted, see 2 Hale, P. C. 83, 84; Fost. 318. It seems it is not justifiable.

(*s*) Fost. 275; Hawk. P. C. b. 1, c. 28, ss. 21, 24.

(*t*) Puff. L. of N. l. ii. c. 5.

(*u*) L. 3, tr. 2, c. 36.

(*x*) See Mawgridge's case, Keyl. 128, 129.

(*y*) Fost. 274; 1 Hale, P. C. 488. This was expressly provided by the statute 24 Hen. 8, c. 5; and though that statute was repealed by 9 Geo. 4, c. 31 (now itself repealed by 24 & 25 Vict. c. 95), its repeal has made no alteration of the law as laid down in the text,—the statute of Hen. 8, having been made in affirmance of the common law. (See Fost. 275.)

of a house *in the day time*, unless such entry carries with it an attempt of robbery, arson, murder, or the like (*z*). [So the Jewish law, which punished no theft with death, made homicide only justifiable in case of *nocturnal* housebreaking: "if a thief be found breaking up, and he be smitten that "he die, no blood shall be shed for him; but if the sun be "risen upon him, there shall blood be shed for him, for he "should have made full restitution" (*a*).

At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact (*b*): and by the Roman Law of the Twelve Tables, a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapons (*c*): which amounts very nearly to the same as is permitted by our own constitutions. The Roman law, also, justifies homicide when committed in defence of the chastity either of one's self or relations (*d*): and so too, according to Selden, stood the law in the Jewish republic (*e*). The English law, likewise, justifies a woman killing one who attempts to ravish her (*f*); and so the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other (*g*). And no doubt the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor (*h*).

(*z*) 1 Hale, P. C. 488; 1 East, P. C. c. 5, s. 44; Hawk. P. C. b. 1, c. 28, s. 23; Fost. 274; see also 24 Hen. 8, c. 5, cited sup. p. 49, n. (*y*).

(*a*) Exod. xxii. 2.

(*b*) Potter, Antiq. b. 1, c. 24.

(*c*) Cic. pro Milone, 3; Ff. 9, 2, 4.

(*d*) "*Divus Hadrianus rescripsit "eum qui stuprum sibi vel suis infe- "rentem occidit, dimittendum.*"—Ff. 48, 8, 1.

(*e*) De Legibus Hebræor. l. iv. c. 3.

(*f*) Bac. Elem. 34; Hawk. P. C. b. 1, c. 28, s. 21; Fost. ubi sup.

(*g*) 1 Hale, P. C. 485, 486.

(*h*) It is remarked in the Report of the Criminal Code Bill Commission (p. 11), that the common law, though it sanctions the defence of a man's personal liberty and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary;

[Fourthly, there is one species of justifiable homicide where the party slain is equally innocent as he who occasions his death; the justification arising from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish. To this head belongs that case mentioned by Lord Bacon, where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrust the other from it, whereby he was drowned (*i*).

2. Excusable homicide is of two sorts, either *per infortunium*, by misadventure; or *se defendendo*, upon a sudden affray.

Homicide *per infortunium*, is where a man, doing a lawful act without any intention of hurt, unfortunately kills another, as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person is shooting at a mark, and undesignedly

that is, that the mischief sought to be prevented could not be prevented by less violent means, and that the mischief done by, or which might reasonably be anticipated from, the force used is not disproportioned to the injury or mischief which it is intended to prevent. See, also, the cases of R. *v.* Moir, Ann. Reg., vol. 72, p. 344, and R. *v.* Hewlett, 1 F. & F. 91, referred to in note B. appended to the same Report.

(*i*) Elem. c. 5. Blackstone (vol. iv. p. 186) treats the homicide supposed in the text as *excusable*, not *justifiable*. But see as to this Hawk. P. C. b. 1, c. 28, s. 26. The case is alluded to in the Report of the Criminal Code Bill Commission (note A.), where it is remarked in reference to the doctrine of compulsion, "Casuists have for centuries amused themselves, and may amuse themselves for centuries to come, by speculations as to the moral duty of two persons in the water struggling for the possession of a plank capable of supporting only one. If ever such a case should come for decision before a court of justice (which is improbable), it may be found that the particular circumstances render it easy of solution. We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence. We judge it better to leave such questions to be dealt with when, if ever, they arise in practice, by applying the principles of law to the circumstances of the particular case."

[kills a man (*m*): for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure, for the act of correction was lawful; but if he exceeds the bounds of moderation either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases, according to the circumstances, murder; for the act of immoderate correction is unlawful (*n*). Thus by an edict of the Emperor Constantine, when the rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment; and if death accidentally ensued, he was guilty of no crime; but if he struck him with a club or a stone, and thereby occasioned his death; or if, in any other yet grosser manner, "*immoderate suo jure utatur,—tunc reus homicidii sit*" (*o*).

But to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and sword playing, the succeeding amusements of their posterity; and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is manslaughter and felony (*p*). Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of dangerous consequence (*q*). And in

(*m*) Hawk. P. C. b. 1, c. 29, ss. 2, 6.

(*n*) 1 Hale, P. C. 473, 474; Hawk. P. C. b. 1, c. 29, s. 5.

(*o*) Cod. l. lx. t. 14.

(*p*) Blackstone to this statement of the law appends the remark (vol. iv. p. 183), that "if the sovereign command or permit such diversion, it is said to be only misadventure; for then the act is lawful. In like manner, as by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games authorized or permitted by the state, was not held to be guilty of homicide." (He cites Hawk. P. C. b. 1, c. 29, s. 58; Plato de Leg. l. vii.; Ff. 9, 2, 7.)

(*q*) Hawk. P. C. b. 1, c. 29, s. 3; Ward's case, 1 East, P. C. 270.

[general, if death ensues in consequence of a dangerous, idle, and unlawful sport, as, for example, the shooting or casting stones in a town, or the barbarous diversion of cock-throwing,—in these and similar cases the slayer is guilty of manslaughter, and not misadventure only; for these are unlawful acts (*r*).

As for homicide *se defendendo*, upon a sudden affray, —this is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, which is calculated to hinder the perpetration of an atrocious crime, and where the slayer is himself free from all blame (*s*); which is not only a matter of excuse, but of justification. But the self-defence of which we are now speaking, is that whereby a man may protect himself from an assault or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him; in which latter case the law presumes both parties to be in some degree in fault (*t*). And this is one instance of what the law expresses by the word *chance medley;* or, as some chose rather to write it, *chaud medley:* the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import: but the former is, in common speech, too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. VIII. c. 5, and our antient books, that it is properly applied to such killing as happens upon a sudden rencounter (*u*). This right of natural defence does not imply a right of attacking; for,

(*r*) 1 Hale, P. C. 472; Fost. 275; Hawk. P. C. b. 1, c. 30, s. 1.

(*s*) Hawk. ubi sup. c. 28, s. 24.

(*t*) Ibid. The slayer is, however, no longer punishable by law, though it was formerly otherwise. Vide post, p. 58.

(*u*) Blackstone (vol. iv. p. 184) defines *chance medley*, to be such killing as happens *in self-defence* in the course of a sudden brawl. But it is clear that the term equally applies, though the killing in the course of a brawl shall be such as to amount to *manslaughter*. See stat. 24 Hen. 8, c. 5; Keyl. 67; 3 Inst. 55, 59; Hawk. ubi sup. c. 30, s. 1; Fost. ubi sup.

[instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible, or at least probable, means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide in self-defence, upon sudden affray, from that of manslaughter in the proper legal sense of the word (*x*). But the true criterion between them seems to be this: when both parties were actually combating, at the time when the mortal stroke was given, or if the slayer was not at that time in immediate danger of death, the slayer is guilty of manslaughter (*y*): but if the slayer had not begun to fight, or having begun, declined, or endeavoured to decline, any further struggle, and afterwards, being closely pressed by his antagonist, killed him to avoid his own destruction, this is homicide excusable by self-defence (*z*). For which reason the law requires, that the person who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he gives the mortal stroke (*a*); and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood (*b*). And though it may be cowardice, in time of war between two independent nations, to flee

(*x*) 3 Inst. 55.

(*y*) Fost. 277.

(*z*) Ibid.

(*a*) Blackstone says (vol. iv. p. 185), "before he turns upon his "assailant." But though a person retreating to the wall should give several wounds in the course of his retreat, yet if he gives no mortal one till he gets thither, it has been laid down to be homicide *se defendendo* only. (See 1 Hale, P. C. 479; Hawk. P. C. b. 1, c. 29, s. 15.)

(*b*) If a man strike another upon malice prepense, and then fly to the wall, and there kill him in his own defence, he is guilty of murder. (Hawk. P. C. b. 1, c. 29, s. 17.)

[from an enemy, yet between two fellow-subjects the law countenances no such point of honour: because the sovereign and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves (*c*). In this the civil law also agrees with ours, or perhaps goes rather farther,—"*qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt*" (*d*). The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault will permit him (*e*); for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm, and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law (*f*).

And, as the *manner* of the defence, so is also the *time* to be considered; for if the person assaulted does not fall upon the aggressor till the fray is over, or when he is running away, this is revenge and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for if two persons, A. and B., agree to fight a duel, and A. gives the first onset, and B. retreats as far as he safely can, and then kills A.; this is murder, because of the previous malice and concerted design (*g*). And if A., upon a sudden quarrel, assaults B. first, and upon B.'s returning the assault, A. really and *bonâ fide* flies; and, being driven to the wall, turns again upon B. and kills him: this may be *se defendendo* according to some of our writers (*h*), though others (*i*) have thought this opinion too favourable, inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse of self-defence, the principal civil and

(*c*) 1 Hale, P. C. 481.
(*d*) Ff. 9, 2, 45.
(*e*) 1 Hale, P. C. 483.
(*f*) Puff. b. 2, c. 5, s. 13.
(*g*) 1 Hale, P. C. 479.
(*h*) Ib. 482.
(*i*) Hawk. P. C. b. 1, c. 29, s. 17.

[natural relations are comprehended. Therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting, being construed the same as the act of the party himself (*k*).]

Excusable homicide, in both the species here described, was formerly considered as involving in it some degree of legal blame or punishment; and as distinguishable, in this respect, from that which was *justifiable*. In the case of misadventure the law presumed negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it: who therefore was not altogether faultless (*l*). [And as to the necessity which excuses a man who kills another in a sudden fray *se defendendo*, Lord Bacon entitles it *necessitas culpabilis* (*m*). For it was always understood, (as before remarked,) that the quarrel or assault arose from some unknown wrong, or some provocation in word or deed; and since in quarrels both parties may be, and usually are, in some fault—and as it scarce can be tried who was originally in the wrong—the law would not hold the survivor entirely guiltless. The law besides might have a further view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining that he who slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

Nor was the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; which implies that the death of a man, however it happens, will leave some stain behind it. And the Mosaical law appointed certain cities of refuge for him who killed his neighbour unawares: "as if a man

(*k*) 1 Hale, P. C. 484.
(*l*) Hawk. P. C. b. 1, c. 28, s. 24.
(*m*) Elem. c. 5.

["goeth into the wood with his neighbour to hew wood, "and his hand fetches a stroke with his axe to cut down "a tree, and the head slippeth from the helve, and lighteth "upon his neighbour that he die, he shall flee unto one of "these cities and live" (*n*). But it seems he was not held wholly blameless, any more than in the English law: since the avenger of blood might slay him before he reached his asylum; or if he afterwards stirred out of it, till the death of the high priest. In the Imperial law, likewise, casual homicide was excused by the indulgence of the emperor, signed with his own sign-manual, "*adnotatione principis*:" otherwise the death of a man, however committed, was in some degree punishable (*o*). Among the Greeks, homicide by misfortune was expiated by voluntary banishment for a year (*p*). In Saxony, a fine was paid to the kindred of the slain: which also, among the Western Goths, was little inferior to that of voluntary homicide (*q*); and formerly in France, no person was ever absolved in cases of this nature, without a largess to the poor, and the charge of certain masses for the soul of the party killed (*r*).

The penalty for an excusable homicide inflicted by our laws, is said by Sir Edward Coke to have been antiently no less than death (*s*); which, however, is with reason denied by later and more accurate writers (*t*). It seems rather to have consisted in a forfeiture; some say of all the goods and chattels, others only of part of them; by way of fine or *weregild* (*u*). Which was probably disposed of, (as in France,) *in pios usus*, according to the humane

(*n*) Numb. xxxv. and Deut. xix.

(*o*) Cod. 9, 16, 5.

(*p*) Plato de Leg. l. 9. To this expiation by banishment, the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third Iliad, that, when a child, he was obliged to flee his country for casually killing his playfellow, — "νηπιος οὐκ ἐθελων."

(*q*) Stiern. de Jure Goth. l. 3, c. 4.

(*r*) 4 Bl. Com. 188, cites De Morney on the Digest.

(*s*) 2 Inst. 148, 315.

(*t*) 1 Hale, P. C. 425; Hawk. P. C. b. 1, c. 29, s. 21; Fost. 282.

(*u*) Fost. 287.

[superstition of the times, for the benefit of *his* soul who was suddenly sent to his account with all his imperfections on his head. But that reason having long ceased, and the penalty, especially if a total forfeiture, growing more severe than was intended, in proportion as personal property became more considerable, the delinquent had, as early as our records will reach, a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same (*x*).] And in later times, to prevent this expense, in cases where the death notoriously happened by misadventure or in self-defence, the judges usually directed a general verdict of acquittal (*y*). Afterwards, by statute 9 Geo. IV. c. 31, s. 10, it was provided, that no punishment or forfeiture should be thenceforth incurred by any person who should kill another by misfortune or in his own defence, or in any other manner without felony; and though this provision was afterwards repealed, a clause to the same purpose was inserted in 24 & 25 Vict. c. 100, the statute by which offences against the person are at present regulated (*z*). So that all practical distinction between justifiable and excusable homicide is, under our existing law, wholly done away.

3. [*Felonious* homicide is an act of a very different nature from the former; being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

Self-murder,—the pretended heroism, but real cowardice of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, —though the attempting it seems to be countenanced by the civil law (*a*), yet was punished, by the Athenian law,

(*x*) Fost. 283; Hawk. P. C. b. 2, c. 37, s. 2.

(*y*) Fost. 288; 4 Bl. Com. 188; and see Christian's note at that place.

(*z*) See 24 & 25 Vict. c. 100, s. 7.

(*a*) "*Si quis impatientiâ doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum.*"—Ff. 49, 16, 6.

[with cutting off the hand which did the desperate deed (*b*). The law of England, also, wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it. And as the suicide is guilty of a double offence, one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the sovereign, who hath an interest in the preservation of all his subjects: our law has ranked this among the highest crimes,—making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder (*c*). A *felo de se*, therefore, is he that deliberately puts an end to his own existence; and he also is so considered who, maliciously attempting to kill another, occasions his own death: as where a man shoots at another, and the gun bursts and kills himself (*d*). But if a man is killed at his own request by the hand of another, the former is not deemed in law a *felo de se*, though the latter is a murderer (*e*). In homicide committed on one's self, the party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroners' juries are apt to carry it, viz. that the very act of suicide is an evidence of insanity: as if every man,

(*b*) Pott. Antiq. b. 1, c. 26.

(*c*) 4 Bl. Com. p. 189; Keylw. 136. Notwithstanding this opinion of Blackstone, it was afterwards adjudged that such accessory could not be tried for murder, as his principal could not be tried. (See R. *v.* Russell, 1 Moo. C. C. R. 356; R. *v.* Laddington, 9 C. & P. 79.) But by recent statutes, and now by 24 & 25 Vict. c. 94, s. 2, an accessory either before or after the fact—as stated sup. p. 42—is made liable to be tried and convicted whether the principal felon shall or shall not be amenable to justice. It may be observed here, that if two persons mutually agree to commit suicide *together*, and accordingly take poison or the like together, and only one dies, the survivor is guilty of murder. (R. *v.* Dyson, R. & R. 523; R. *v.* Alison, 8 C. & P. 418.)

(*d*) Hawk. P. C. b. 1, c. 27, s. 4.

(*e*) Ib. s. 6.

[who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer.] The law very rationally judges that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong: or rather, (to express it more correctly,) does not prevent his having a sufficient degree of reason to know that his act is wrong; which is necessary to form a legal excuse (*f*). And therefore it has been laid down that if a lunatic kills himself in a lucid interval, he is a *felo de se* as much as if he were a sane man (*g*).

[But now the question follows, what punishment can human laws inflict, on one who has withdrawn himself from their reach? They can only act upon what he has left behind him—his reputation and fortune; and this the law of England formerly did with the greatest severity. It acted on the former by an ignominious burial in the highway, with a stake driven through his body, and without Christian rites of sepulture; on the latter by a forfeiture of all his goods and chattels to the Crown, hoping

(*f*) Vide sup. p. 28, n. (*x*).

(*g*) 4 Bl. Com. 190; 1 Hale, P. C. 412. The views of our most eminent writers upon criminal law agree, in this respect, with Blackstone. "It is not every melancholy "or hypochondriac distemper that "denominates a man *non compos*," (says Sir M. Hale, ubi sup.,) "for "there are few who commit this "offence (of suicide) but are under "such infirmities; but it must be "such an alienation of mind that "renders them to be madmen or "frantic, or destitute of reason." And Hawkins, (b. 1, c. 27, s. 2,) lays down a similar doctrine; and reprobates the notion, which he says had unaccountably prevailed of late, that every one who kills himself must be *non compos*. It is to be observed, however, that there are many cases of suicide, in which no motive for the act appears, or can be imagined, such as can be supposed to operate upon a mind free from morbid delusion. In these circumstances the practice of juries to return a verdict of insanity, without further evidence of unsoundness of mind, does seem fairly to fall under the censure in the text. In other kinds of murder, also, this apparent want of rational motive is of frequent occurrence; and ought, it would seem, to lead to the same conclusion. But the *danger* of acquittal on this ground, without further proof of insanity, should deter a jury from a verdict of that description, unless the circumstances be very strong and peculiar.

[that his care for either his own reputation or the welfare of his family would be some motive to restrain him from so desperate and wicked an act.] But the only legal consequences which now attend a felonious self-destruction, are the deprivation of Christian rites. For by 4 Geo. IV. c. 52, s. 1, it was provided, that it shall not be lawful for the coroner to direct the interment of a *felo de se* in any public highway; but that he shall direct him to be interred,—without any stake being driven into his body,—in the churchyard or other burying ground; and that, within twenty-four hours after the inquisition, and between nine and twelve at night: it being, however, further provided that nothing in the Act shall authorize any rites of Christian burial. As to the forfeiture—till the law on this subject was altered—it had relation back to the time of the act done in the felon's lifetime, which was the cause of his death. [And therefore if husband and wife were possessed jointly of a term of years in land, and the husband drowned himself,—the land was forfeited to the Crown, and the wife lost the survivorship. For by the act of casting himself into the water, he forfeited the term, which gave a title to the Crown prior to the wife's title by survivorship; which could not accrue till the instant of her husband's death (*h*).] But forfeiture in this species of felony has now, as in other kinds, been wholly abolished by the 33 & 34 Vict. c. 23, (the Felony Act of the year 1870,) to which we have already made frequent reference (*i*).

[The other species of criminal homicide is, that of killing another man. But in this there are also degrees

(*h*) Finch, L. 216.

(*i*) Even prior to this Act, the forfeiture which accrued in the case of a *felo de se*, was often remitted by the crown. Blackstone remarking, (vol. iv. p. 190,) that "though "it must be owned that the letter "of the law borders a little on severity, yet it is some alleviation "that the power of mitigation is "left in the breast of the sovereign; "who, upon this (as on all other "occasions), is reminded by the "oath of his office, to execute "judgment in mercy."

[of guilt, which divide the offence into *manslaughter* and *murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles: and principally consists in this, that manslaughter, when voluntary, arises from the sudden heat of the passions; murder, from the wickedness of the heart.

First. *Manslaughter* is, therefore, thus defined (*k*): the unlawful killing of another, without malice, either express or implied (*l*): which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. These were called, in the Gothic institutions, "*homicidia vulgaria; quæ aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu*" (*m*): and hence it has been held that in manslaughter there can be no accessories before the fact (*n*); because it must be done without premeditation.

As to the first or *voluntary* branch: if upon a sudden quarrel in the way of chance medley (*o*), two persons fight, and one of them kills the other, that is manslaughter; and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion, and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt (*p*). So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though he is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter (*q*). But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion

(*k*) 1 Hale, P. C. 466.

(*l*) In an indictment for manslaughter, the charge should be that "the defendant did feloniously "kill and slay the deceased," and it is unnecessary to set forth the manner or means. (24 & 25 Vict. c. 100, s. 6.)

(*m*) Stiern. de Jure Goth. l. 3, c. 4.

(*n*) Vide sup. p. 39.

(*o*) Vide sup. p. 53.

(*p*) See Hawk. P. C. b. 1, c. 31, s. 29.

(*q*) Kelyng, 135.

[to subside and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge, and not heat of blood; and accordingly amounts to murder (*r*). So if a man takes another in the act of adultery with his wife, and kills him directly on the spot; though this was allowed by the laws of Solon (*s*), as likewise by the Roman civil law if the adulterer was found in the husband's own house (*t*),—and also among the antient Goths (*u*),—yet in England it is not absolutely ranked in the class of justifiable homicides, as in the case of forcible rape; but it is manslaughter (*x*). It is, however, the lowest degree of it; and therefore in such a case the court directed the burning in the hand, formerly inflicted for manslaughter and other felonies not punished with death, to be gently inflicted; because there could not be a greater provocation (*y*). Manslaughter therefore on a sudden provocation, differs from excusable homicide *se defendendo* on a sudden affray, in this; that in the one case there is an apparent necessity for self-preservation to kill the aggressor; in the other there is no necessity at all, being only a sudden act of revenge (*z*).

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this;—that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, and one of them kills the other; this is manslaughter, because the original act was unlawful: but it is not murder, for the one had no intent to do the other any personal mischief (*a*). So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and

(*r*) Fost. 296.
(*s*) Plut. in Vit. Solon.
(*t*) Ff. 48, 5, 24.
(*u*) Stiern. de Jure Goth. l. 3, c. 2.
(*x*) 1 Hale, P. C. 486.
(*y*) Sir T. Raym. 212.
(*z*) Vide sup. p. 53.
(*a*) 3 Inst. 56.

[circumspection; as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter or murder, according to the circumstances under which the act was done. If it were in a country village where few passengers are, and he call out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning (*b*); and murder, if he knows of their passing, and yet gives no warning at all,—for then it is malice against all mankind (*c*). And in general, when an involuntary killing happens in consequence of an unlawful act: it will be either murder or manslaughter according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tending to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will amount only to manslaughter (*d*).]

Next, as to the *punishment* of this degree of homicide. The crime of manslaughter amounts to felony (*e*): and every person convicted thereof may be sentenced, at the discretion of the court, to be kept in penal servitude for

(*b*) Kel. 40.

(*c*) 3 Inst. 57.

(*d*) Fost. 258; Hawk. P. C. b. 1, c. 31, s. 46. Homicide, however, amounts to murder, if committed in resisting an officer of justice in the lawful execution of his duty, even though there be no felonious intent. Vide post, p. 71.

(*e*) In the particular case of manslaughter by *stabbing*, though done upon sudden provocation, the offence was formerly a *capital* felony. This was by statute 1 Jac. 1, c. 8, which provided, that when one thrust or stabbed another,—the party stabbed not having then a weapon drawn, nor having then first stricken the party stabbing,—so that he died thereof within six months after, the offender should not have the benefit of clergy, though he did it not of malice aforethought. "A statute made," says Blackstone (vol. iv. p. 193), "on account of the frequent quarrels and stabbings with short daggers, between the Scotch and English at the accession of James I." But this Act was repealed (as well as the 43 Geo. 3, c. 58, and 1 Geo. 4, c. 90, s. 2, relating to the same subject) by 9 Geo. 4, c. 31.

life or for a term of not less than five years: or to be imprisoned, with or without hard labour, for any term not exceeding two years: or to pay such fine as the court shall award, in addition to or without such other discretionary punishment as aforesaid (*g*).

[Secondly. We are next to consider the crime of deliberate and wilful *murder;* a word which (as denoting a crime) was antiently applied only to the secret killing of another (*h*); which the word *moërda* signifies in the Teutonic language (*i*). And it was defined "*homicidium quod nullo vidente, nullo sciente, clam perpetratur*" (*k*); for which the vill wherein it was committed,—or, if that were too poor, the whole hundred,—was liable to a heavy amercement, which amercement itself was also denominated *murdrum* (*l*). This was an antient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murder (*m*); and, (according to Bracton,) was introduced into this kingdom by King Canute, to prevent his countrymen, the Danes, from being privily murdered by the English (*n*); and was afterwards

(*g*) 24 & 25 Vict. c. 100, s. 5; 27 & 28 Vict. c. 47. Besides the punishment of manslaughter considered as a crime, it is attended, under Lord Campbell's Act (9 & 10 Vict. c. 93), with a liability to make pecuniary satisfaction to the representatives of the deceased. It may be here also observed (and the remark applies to *all* the felonies mentioned in this chapter with the exception of murder), that by 24 & 25 Vict. c. 100, s. 71, the court may, in its discretion, add to the punishment inflicted a requisition to give security for keeping the peace.

(*h*) Dial. de Scacc. l. 1, c. 10.

(*i*) Stiern. de Jure Sueon. l. 3, c. 3. The word *murdre* in the old statutes also signified any kind of concealment or stifling. So in the statute of Exeter, 14 Edw. 1, "*Je riens ne celerai, ne sufferai estre celé, ne murdré,*" which is thus translated into Fleta, l. 1, c. 18, s. 4, "*Nullam veritatem celabo, nec celari permittam, nec murdrari.*" And the words "*pur murdre le droit,*" in the articles of that statute, are rendered in Fleta, ib. s. 8, "*pro jure alicujus murdrando.*"

(*k*) Glanv. l. 14, c. 3.

(*l*) Bract. l. 3, tr. 2, c. 15, s. 7; Stat. Marl. c. 26; Fost. 281.

(*m*) Stiern. l. 3, c. 4.

(*n*) Bracton, ubi sup.

[continued by William the Conqueror, for the like security to his own Normans (*o*). And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman, (the presentment whereof was denominated *englescherie*,) the country seems to have been excused from this burthen (*p*). But this difference being totally abolished by statute 14 Edw. III. st. 1, c. 4, we must now, (as is observed by Staundforde,) define murder in quite another manner; without regarding whether the party slain was killed openly or secretly, or whether he was of English or of foreign extraction (*q*).

Accordingly murder is thus defined by Sir Edward Coke (*r*): "When a person of sound memory and discre-" tion unlawfully killeth any reasonable creature in being, " and under the king's peace, with malice aforethought, " either express or implied" (*s*). The best way of examining the nature of this crime, will be by considering the several branches of this definition.]

First, it must be committed by a *person of sound memory and discretion;* and hence, if there be a defect of the understanding in the person charged, by reason of his infancy, lunacy or idiocy, according to the distinctions already considered, he cannot be convicted of this or any other crime (*t*).

[Next, it happens when a person, of such sound discretion, *unlawfully killeth*. The unlawfulness arises from the killing without lawful warrant or excuse: and there must also be an actual killing, to constitute murder; and not merely an assault with intent to kill (*u*). The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature

(*o*) 1 Hale, P. C. 447.

(*p*) Bract. l. 3, tr. 2, c. 15.

(*q*) P. C. l. 1, c. 10.

(*r*) 3 Inst. 47.

(*s*) In an indictment for murder, the charge is that "the defendant " did feloniously, wilfully, and of " his malice aforethought, kill and " murder the deceased," and it is not necessary to set forth the manner or means. (24 & 25 Vict. c. 100, s. 6.)

(*t*) Vide sup. pp. 23—29.

(*u*) 1 Hale, P. C. 425. As to an *attempt* to murder, &c., vide post, p. 77.

[may be overcome (*x*); but if a person be indicted for one species of killing,—as by poisoning,—he cannot be convicted by evidence of a totally different species of death, —as by shooting with a pistol, or starving. But where they only differ in circumstances; as if a wound be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet; this difference is immaterial (*y*). Of all species of murder the most detestable is that by poison; because it can of all others be the least prevented, either by manhood or forethought (*z*): and therefore, by the statute 22 Hen. VIII. c. 9, it was adjudged treason; and a more grievous and lingering kind of death was inflicted for it than the common law allowed, namely, boiling to death (*a*); but this Act did not live long, being repealed by 1 Edw. VI. c. 12. It is to be observed, that if a man does an act of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no

(*x*) It seems doubtful whether by our law, the bearing false witness against another, with intent to take away his life, is murder, even though the person convicted on such testimony, be executed. (See R. *v.* Macdaniel, 1 Leach, 52; 1 East, P. C. 333; 3 Inst. 48; Fost. 131.) But, as Blackstone remarks, (vol. iv. p. 196,) the Gothic laws punished in this case both the judge, the witnesses and the prosecutor (Stiern. de Jure Goth. l. 3, c. 3), and among the Romans, the *lex Cornelia de sicariis* punished the false witness with death, as being a species of assassination (Ff. 48, 8, 1); and there is no doubt, Blackstone adds, that it is equally murder *in foro conscientiæ* as killing with a sword; though there may be reason to forbear to punish it as such, to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions.

(*y*) 3 Inst. 135; 2 Hale, P. C. 185.

(*z*) 3 Inst. 48.

(*a*) This extraordinary punishment seems to have been adopted by the legislature, from the peculiar circumstances of the crime which gave rise to it; for the preamble of the statute informs us that John Roose, a cook, had been lately convicted of throwing poison into a large pot of broth prepared for the Bishop of Rochester's family, and for the poor of the parish; and the said John Roose was, by a retrospective clause of the same statute, ordered to be boiled to death. Lord Coke mentions several instances of persons suffering this horrid punishment. See 3 Inst. 28.

[killing may be primarily intended. As was the case of the unnatural son who exposed his rich father to the air against his will, by reason whereof he died (*b*); of the harlot who laid her child under leaves in an orchard, where a kite struck and killed it (*c*); and of the parish officers who shifted a child from parish to parish, till it died for want of care and sustenance (*d*). So, too, if a man hath a beast that is used to do mischief, and he, knowing it, *suffers* it to go abroad, and it kills a man, even this is manslaughter in the owner; but if he had purposely *turned it loose*,—though barely to frighten people and make what is called sport,—it is with us, as it was in the Jewish law (*e*), as much murder as if he had incited a bear, or a dog, to worry them (*f*).] It is settled, however, in all cases of homicide, that in order to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which the whole day, upon which the hurt was done, shall be reckoned the first (*g*). It may be observed that if a physician or surgeon gives his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure (*h*); and though by some of the older authorities (*i*), it was held, that if he were not a *regular* physician or surgeon who administered the medicine or performed the operation, it was manslaughter at the least,—Sir Matthew Hale very justly questions the law of this determination (*j*). On the other hand, it is clear that where death is occasioned by

(*b*) Hawk. P. C. b. 1, c. 31, s. 5.
(*c*) 1 Hale, P. C. 432.
(*d*) Palm. 545.
(*e*) Exod. xxi. 28, 29.
(*f*) Palmer, 431.
(*g*) 4 Bl. Com. p. 197; Hawk. P. C. b. 1, c. 31, s. 9. As to this rule, see the Report of the Criminal Code Bill Commission, p. 23.
(*h*) Bl. Com. ubi sup.
(*i*) Britt. c. 5; 4 Inst. 251.
(*j*) 1 Hale, P. C. 430. See also, in accordance with the opinion of Hale and Blackstone, R. *v.* Van Butchell, 3 C. & P. 629; R. *v.* Williamson, ib. 635; R. *v.* St. John Long, 4 C. & P. 398, 423; R. *v.* Spiller, 5 C. & P. 333.

gross want of skill or care in the medical man (whether he be regularly licensed or not), it will amount to manslaughter; and cases of this kind have, in fact, been before the courts (*k*).

[Further: the person killed must be a "*reasonable creature, in being, and under the king's peace*" at the time of the killing (*l*). To kill an alien or an outlaw, (who are both under the king's peace and protection,) is therefore as much murder as to kill the most regular-born Englishman. On the other hand, it is not murder to slay an alien enemy in the heat of battle (*m*); and, again, to kill a child in its mother's womb is not adjudged murder, but falls under a different description of crime, which will be presently considered (*n*).

Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which distinguishes murder from other killing: and this malice prepense, *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved and malignant heart (*o*); *un disposition à faire un male chose* (*p*): and it may be either *express* or *implied* in law. Express malice is when one, with a sedate, deliberate mind and formed design doth kill another; which formed design may be evidenced by external circumstances, discovering that inward intention;—as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm (*q*). This takes place in the case of deliberate duelling, where both parties meet avowedly with an intent to commit homicide,—thinking it their duty as

(*k*) See R. *v.* St. John Long, 4 C. & P. 398, 423; R. *v.* Spiller, 5 C. & P. 333.

(*l*) 4 Bl. Com. 198. Hence if a foreigner should kill a foreigner *on the high seas or on board a foreign ship*, no offence is committed which is triable in this country. (See R. *v.* Lopez, 1 Dears. & B. 525.)

(*m*) 3 Inst. 50; 1 Hale, P. C. 433.

(*n*) Hale, ubi sup.; vide post, p. 83.

(*o*) Foster, 256.

(*p*) 2 Roll. Rep. 461.

(*q*) 1 Hale, P. C. 451.

[gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures; without any warrant or authority from any power either Divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder on them and on their seconds also (*r*). Yet it requires a great degree of passive valour to combat the dread of even undeserved contempt, arising from false notions of honour (*s*). Also, if, even upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*. As when a park-keeper tied a boy that was stealing wood to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died,—these were justly held to be murders; because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter (*t*). Neither shall he be guilty of a less crime, who in consequence of such a wilful act as shows him to be an enemy to all mankind in general, causes the death of a fellow creature; as by going deliberately, and with an intent to do mischief, upon a horse used to strike (*u*); or by coolly discharging a gun among a multitude of people (*x*). So if a man resolves to kill the next man he meets, and does kill

(*r*) Hawk. P. C. b. 1, c. 31, s. 31. See R. *v.* Murphy, 6 C. & P. 103; R. *v.* Young, ib. 645.

(*s*) 4 Bl. Com. p. 199. Blackstone adds, that "the strongest "prohibitions and penalties of the "law will never be entirely effectual to eradicate this unhappy "custom; till a method be found "out of compelling the original "aggressor to make some other satisfaction to the affronted party, "which the world shall esteem "equally reputable, as that given "at the hazard of life and fortune, "as well of the party insulted, as "of him who hath given the insult."

(*t*) 1 Hale, P. C. 454, 473, 474.

(*u*) Lord Raym. 143.

(*x*) Hawk. P. C. b. 1, c. 31, s. 12.

[him, it is murder, although he knew him not, for this is universal malice; and if two or more come together to do an unlawful act against the peace, of which the consequence may probably be bloodshed,—as to beat a man, to commit a riot, or to rob a park,—and one of them in the prosecution of such intent kills a man; it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand (*y*).

Also, in many cases, where no malice is expressed, the law will imply it. As where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved (*z*): and if a man kill another suddenly, without any or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight, or no apparent cause. No affront by words or gestures alone is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another (*a*). But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise and not to kill him; the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter and not murder (*b*). In like manner, if one kills an officer of justice, either civil or criminal, while resisting him in the execution of his duty, and knowing his authority or the intention with which he interposes, or if any of his assistants be killed under the like circumstances, the law will imply malice, and the killer shall be guilty of murder (*c*); though it is manslaughter only, if

(*y*) Hawk. P. C. b. 1, c. 31, s. 10.

(*z*) 1 Hale, P. C. 455.

(*a*) Hawk. ubi sup. s. 33; Hale, ubi sup. 455, 456. See the Report of the Criminal Code Bill Commission, p. 24, where it is remarked that though "the authorities for saying that words can never amount to a provocation are weighty, we are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow."

(*b*) Foster, 291.

(*c*) Hale, ubi sup. 457; Hawk. ubi sup. s. 55; Foster, 270, 308,

[the warrant under which the officer acts be void, or be executed in an unlawful manner (*d*). So, in case of a sudden affray, if a third person interpose to part the combatants, giving them notice of his friendly intention, and either of the combatants kill him in resisting his interposition, this is murder (*e*). And if one intend to commit felony of another kind, and, in the prosecution of such intent, undesignedly kills a man, this is also murder (*f*). Thus, if one shoots at A., and misses *him*, but kills B., this is murder: because of the previous felonious intent, which the law transfers from one to the other: for the malice, as it has been sometimes expressed, *egreditur personam* (*g*). The same is the case where one lays poison for A.; and B., against whom the prisoner had no felonious intent, takes it, and it kills him; this is likewise murder (*h*). It were endless to go through all the cases of homicide which have been adjudged, either expressly or impliedly, malicious. These, therefore, may suffice for a specimen: and we may take it for a general rule that all homicide is malicious,—and, of course, amounts to murder,—unless where *justified* by the command or permission of the law; *excused* on account of accident or self-preservation in sudden quarrel; or *alleviated* into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to mitigate or take away the guilt (*i*). For all homicide is

&c. As to killing a *private person* attempting to apprehend a felon, see 2 Hale, P. C. 84; Foster, 272, 309, 318.

(*d*) Hawk. P. C. b. 1, c. 31, ss. 57, 58; Fost. 312.

(*e*) Fost. 272.

(*f*) 1 Hale, P. C. 465.

(*g*) Fost. 262; see Reg. *v.* Smith, 4 Dearsley's C. C. R. 559.

(*h*) 1 Hale, P. C. 466.

(*i*) Fost. 257; Hazel's case, 1

[supposed to be malicious, until the contrary appeareth upon evidence (*k*).]

Although, as will appear hereafter at the proper place, the courts of this country can hear and determine all offences committed by British subjects on board British ships at sea or elsewhere within the Admiralty jurisdiction (*l*), it was formerly a fundamental principle in our law that murder or other crime committed on land abroad could not be tried or in any way dealt with in this country; but by many statutes this principle is now broken in upon, and amongst these by 24 & 25 Vict. c. 100, s. 9, which provides, as to the particular crimes of murder and manslaughter now under our consideration, that where either shall be committed by a subject of her Majesty, on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person

Leach, 406; R. *v.* Greenacre, 8 Car. & P. 35.

(*k*) Fost. 255. Upon the distinction between murder and manslaughter, the Report of the Criminal Code Bill Commission (p. 23) observes, "The common law definition of murder is 'unlawfully killing with malice aforethought.' Manslaughter may in effect be defined as 'unlawful killing without malice aforethought.' The objections to these definitions is that the expression 'malice aforethought' is misleading. This expression taken in a popular sense would be understood to mean that in order that homicide may be murder, the act must be premeditated to a greater or less extent, the jury having in each case to determine whether such a degree of premeditation existed as deserved the name. This definition, as so understood, would be obviously too narrow, as without what would commonly be called premeditation, homicide might be committed which would involve public danger and moral guilt in the highest possible degree. Of course it can be pointed out that every intentional act may be said to be done aforethought, for the intention must precede the action. But even with this explanation the expression is calculated to mislead any one but a trained lawyer. The inaccuracy of the definition is still more apparent when we find it laid down that a person may be guilty of murder who had no intention to kill or injure the deceased or any other person, but only to commit some other felony, and the injury to the individual was a pure accident. This conclusion was arrived at by means of the doctrine of constructive or implied malice."

(*l*) See 18 & 19 Vict. c. 91; 30 & 31 Vict. c. 124, and 41 & 42 Vict. c. 73.

killed be a subject of her Majesty or not, such offence may be dealt with, tried, and punished in any place in England or Ireland in which such person shall be in custody, in the same manner in all respects as if such offence had been actually committed in that place (*m*).

With regard to the punishment of murder by the death of the criminal, the words of the Mosaical law,—over and above the general precept to Noah, that "whoso sheddeth man's blood, by man shall his blood be shed,"—are very emphatical in prohibiting the pardon of a murderer. "Moreover ye shall take no satisfaction for the life of a "murderer, who is guilty of death, but he shall surely be "put to death; for the land cannot be cleansed of the "blood that is shed therein, but by the blood of him that "shed it" (*n*). And yet in our country this crime, enormous as it is, was in antient times allowed *the benefit of clergy* (*o*); which was a commutation of capital punishment, once allowed to persons in holy orders, or, what was equivalent, to persons who were able to read,—and originally allowed to these only; though it was afterwards extended both to clergy and laity, whether able to read or not, and was then confined, on the other hand, to felonies of lighter kind, though, by the law of the time, capital offences. But benefit of clergy was wholly abolished by 7 & 8 Geo. IV. c. 28; after having been, by several earlier statutes, long before taken away from murderers through malice prepense, their abettors, procurers, and counsellors (*p*): and by 24 & 25 Vict. c. 100, s. 1, it is now expressly enacted, that every person convicted of murder shall suffer death as a felon (*q*). In atrocious cases, it was, at one time, usual for the court to direct the murderer, after execution, to be hung upon a gibbet in

(*m*) See also 24 & 25 Vict. c. 100, s. 10.

(*n*) Gen. ix. 6; Numb. xxxv. 31, 32.

(*o*) 4 Bl. Com. 201.

(*p*) See 23 Hen. 8, c. 1; 1 Edw. 6, c. 12; 4 & 5 Ph. & M. c. 4.

(*q*) This had previously been provided in similar terms by 9 Geo. 4, c. 31, s. 3, repealed by 24 & 25 Vict. c. 95.

chains near the place where the crime was committed (*r*). And the legality of a direction that the body should be *hung in chains* was declared by 25 Geo. II. c. 37, and 9 Geo. IV. c. 31. [This practice of hanging in chains, which was quite contrary to the express command of the Mosaical law, seems to have been borrowed from the civil law (*s*); which, besides the terror of the example, gives also another reason, viz., that it is a comfortable sight to the relations and friends of the deceased (*t*).] By 25 Geo. II. c. 37, moreover, *dissection* was required to be,—and by 9 Geo. IV. c. 31, might be,—a part of the sentence; and by the same statutes the judge was, in passing sentence, to direct the offender to be executed on the day next but one after that on which it was passed,—unless that day should happen to be Sunday, and then on the Monday following. But these severities were successively laid aside (*u*); and it has now been provided by 24 & 25 Vict. c. 100, s. 2, that sentence of death, on every conviction for murder, shall be pronounced and carried into execution, in the same manner as for other crimes which were capital before that Act. At the time of this statute, that is to say, in the year 1861, all executions took place in public; but a few years afterwards a wide-spread and growing belief that no benefit to the public at large arises from the sight of the death of a criminal, induced the legislature to abolish altogether executions for murder without the prison walls. And it was accordingly enacted by the statute 31 & 32 Vict. c. 24 (the Capital Punishment Amendment Act, 1868), that the judgment of death to be executed on any prisoner *for murder* shall be carried into effect within the walls of the prison in which

(*r*) 4 Bl. Com. 202.

(*s*) "The body of a malefactor "shall not remain all night upon "the tree: but thou shalt in any-"wise bury him that day, that "the land be not defiled."—Deut. xxi. 23.

(*t*) Ff. 48, 19, 28, s. 15.

(*u*) See 2 & 3 Will. 4, c. 75, s. 16; and 4 & 5 Will. 4, c. 26.

he shall be confined at the time of execution, in the presence of the sheriff, gaoler, chaplain, surgeons and such other officers of the prison as the sheriff requires; and of such magistrates of the jurisdiction to which such prison belongs as shall choose to be present; and of such relatives of the prisoner, or other persons as the sheriff or visiting justices shall think proper to admit: and, that the body of the offender shall, as the general rule, and subject to the discretion of a secretary of state, be buried within the prison precincts (*v*).

[By the Roman law *parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack, with a live dog, a cock, a viper and an ape, and so cast into the sea (*x*). Solon, however, in his laws made none against parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity (*y*). And the Persians, (according to Herodotus,) entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards (*z*).] And in like manner our English laws have made no particular provision with regard to this crime, so as to distinguish it in any respect from that of simple murder (*a*). Yet formerly, where a servant killed his master, a wife her husband,—or an ecclesiastical person, (either secular or regular,) his superior to whom he owed faith and obedience (*b*),—this

(*v*) The Act contains provisions for ascertaining by the certificate of the prison surgeon and the verdict of a coroner's jury on the body of the offender, that the judgment of death has been executed. (See 31 & 32 Vict. c. 24, ss. 4, 5.)

(*x*) Ff. 41, 9, 9.

(*y*) Cic. pro S. Roscio, s. 25.

(*z*) Clio, c. 137.

(*a*) Blackstone (vol. iv. p. 202) seems inclined to attribute the want of any distinction with regard to parricide in our law, to the same assumption on the part of its founders as is referred to in the text, viz., that of the impossibility of the crime.

(*b*) "A clergyman," (says Blackstone, vol. iv. p. 203,) "is understood to owe canonical obedience "to the bishop who ordained him "—to him in whose diocese he is "beneficed—and also to the metro-

was accounted a species of treason, called *parva proditio* or petit treason (*c*). And hence it followed that in the particular case, also, where a parricide was committed by one who happened to stand in the relation of servant to his parent, he was adjudged guilty of petit treason, though the crime was so ranked under no other circumstances (*d*). For all these cases involved, in contemplation of law, not only murder, but murder aggravated by a species of treason; on account of the violation of private allegiance (*e*). And thus, too, in the antient Gothic constitutions, we find the breach both of natural and civil relations, ranked in the same class with crimes against the state and the sovereign (*f*). Nor was the distinction merely nominal,—the punishment in petit treason, being more severe than in the case of simple murder: for if the offender was a man, the sentence was to be drawn to the place of execution, and then hanged; and, if a woman, to be so drawn and then burned to death (*g*). But the crime itself of petit treason, as distinct from an ordinary murder, is now abolished; it being provided by 24 & 25 Vict. c. 100, s. 8, that any killing which amounted to that offence before 9 Geo. IV. c. 31, shall now be deemed to be murder only, and no greater offence.

II. *Attempt to murder.*—Not only the crime of actual

" politan of such bishop,—and " therefore to kill any of these is " petit treason," and he cites 1 Hale, P. C. 381.

(*c*) As to petit treason, see 25 Edw. 3, st. 5, c. 2; 1 Hale, P. C. 380.

(*d*) Hale, ubi sup.; Bl. Com. vol. iv. p. 202.

(*e*) Foster, 107, 324, 336.

(*f*) "*Omnium gravissima censetur vis facta incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores (et vice versâ), servis in dominos, aut etiam ab homine in semet-ipsum.*"—Stiernh. de Jure Goth. l. 2, c. 3.

(*g*) 1 Hale, P. C. 382; 3 Inst. 211. Blackstone (ubi sup.) remarks that this punishment of burning to death, in the case of the woman, seems to have been handed down to us by the laws of the antient Druids; which condemned a woman (see Cæs. de Bell. Gall. l. 6, c. 19) to be burned for murdering her husband. It was, however, at one period, the usual punishment for *all* treasons committed by those of the female sex.

murder, but that of endeavouring to commit it, amounted till recently, in some cases, to a capital felony (*i*). This crime, however, is no longer punishable with death under any circumstances,—and it is now provided by 24 & 25 Vict. c. 100, s. 11, that whoever with intent *to commit murder* (*k*) shall administer, or cause to be administered, to any person, poison or other destructive thing (*l*); or who shall by any means whatever wound any person or cause him grievous bodily harm,—shall be guilty of felony, and on conviction may be sentenced to penal servitude for life, or for not less than five years; or to imprisonment for any term not exceeding two years, with or without hard labour and solitary confinement (*m*). And by sect. 14 of the same Act, that whoever shall *attempt* to administer to any person, poison or other destructive thing; or who shall shoot at any person (*n*); or who shall by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person; or who shall attempt to drown, suffocate or strangle any person,—with intent, in any of the cases aforesaid, to commit murder, shall (whether any bodily injury be in fact effected or not) be guilty of felony, and liable to the same punishments as above mentioned. Again, by sect. 13, whoever shall set fire to, cast away, or destroy, any ship or vessel, —and by the 12th section, whoever by the explosion of gunpowder, or other explosive substance, shall destroy or damage any building,—with intent to commit murder, shall be liable to be similarly punished. Moreover, the same Act contains (sect. 15) a general provision making it felony (and awarding the same punishments as already mentioned) for any person to attempt to commit murder, by any means other than those above specified. And even maliciously to send, knowing its contents, any letter or

(*i*) Under 7 Will. 4 & 1 Vict. c. 85 (repealed by 24 & 25 Vict. c. 95), an attempt to commit murder by poisoning, wounding, &c., was punishable with death.

(*k*) See R. *v.* Cruise, 8 Car. & P. 541.

(*l*) As to what constitutes an administration of poison, see R. *v.* Michael, 9 Car. & P. 356.

(*m*) See 27 & 28 Vict. c. 47.

(*n*) See Reg. *v.* Smith, 25 L. J. (M. C.) 29.

writing *threatening* to kill or murder any person is (by sect. 16) a felony, punishable by imprisonment as above, with or without the addition of whipping, if the offender be a male under sixteen, or by the alternative sentence of penal servitude to the extent of ten years.

III. *Acts causing, or tending to cause, danger to life or bodily harm.*

Mayhem, (whence the modern phrase *to maim*,) is a civil injury; consisting, as we may remember, in the violently depriving another of the use of such of his members, as may render him the less able, in fighting, either to defend himself or to annoy his adversary. But it is also a heinous crime; and by the antient law of England, he that maimed any man whereby he lost any part of his body was sentenced to lose the like part, *membrum pro membro* (*p*). [But this went afterwards out of use; so that by the common law, as it for a long time stood, mayhem was only punishable by fine and imprisonment (*q*); with the exception, however, of the offence of mayhem by castration, which all our old writers held to be felony; "*et sequitur aliquando pœna capitalis, aliquando perpetuum exilium cum omnium bonorum ademptione*" (*r*). And this, although such mayhem was committed on the highest provocation (*s*).]

By different statutes, however, viz. 5 Hen. IV. c. 5, 37 Hen. VIII. c. 6, and 22 & 23 Car. II. c. 1,—called the Coventry Act (*t*),—specific provisions were, in course of time, made against the offence of maiming, cutting off, or disabling a limb or member (*u*). But these statutes

(*p*) 3 Inst. 118; Brit. c. 55; 4 Bl. Com. 206.

(*q*) Hawk. P. C. b. 1, c. 44, s. 3.

(*r*) Br. l. 3, tr. 2, c. 23.

(*s*) Sir E. Coke (3 Inst. 62) has transcribed a record of Henry the third's time (Claus. 13 Hen. 3, m. 9), by which a gentleman of Somersetshire appears to have been indicted for dealing thus with John the monk, whom he had caught in adultery with his wife.

(*t*) This Act was occasioned by an assault on Sir John Coventry, in the street, and slitting his nose; in revenge (as was supposed) for some obnoxious words uttered by him in parliament. (4 Bl. Com. 206.)

(*u*) The Coventry Act made it a *capital* felony to disable with in-

have all been repealed, so far as regards the matter in question (*x*); and the provision now in force, viz. the 24 & 25 Vict. c. 100, s. 18, enacts that whoever shall unlawfully and maliciously, by any means whatever, wound any person (*y*) or cause him grievous bodily harm; or shoot at any person (*z*); or by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person (*a*), with intent in any of the above cases *to maim, disfigure or disable, or to do some grievous bodily harm to any person*, or with intent *to resist or prevent the lawful apprehension or detaining of any person*,—shall be guilty of felony, and be liable to the same punishment as for an attempt to murder (*b*). And that even without either of such intents being proved, whoever shall unlawfully and

tent to maim or to disfigure. On this statute a Mr. Coke, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact of slitting the nose of Mr. Crispe, Coke's brother-in-law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge-bill; but he recovered. Now the bare attempt to murder was, at common law, no felony; but to disfigure with an intent to disfigure, is made so by this statute, on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the assault was not committed with an intent to disfigure but to murder; and therefore was not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as a hedge-bill, which cannot but endanger the disfiguring him; and in such an attack happens not to kill but only to disfigure him; he might be indicted on this statute: and it might be left to the jury to determine whether it were not a design to murder by disfiguring; and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found the prisoners guilty of a previous intent to disfigure, in order to effect their principal intent to murder; and they were both condemned and executed in due course. (See State Trials, vi. 212.)

(*x*) The Coventry Act was repealed by 9 Geo. 4, c. 31.

(*y*) As to what amounts to "a wounding," see Jenning's case, 9 Car. & P. 130.

(*z*) See Smith's case, 1 Dearsley's C. C. 559.

(*a*) As to what are to be deemed "loaded arms," see 24 & 25 Vict. c. 100, s. 19.

(*b*) The punishments which may be awarded for an attempt to murder, are mentioned sup. p. 78.

maliciously wound or inflict grievous bodily harm upon any other person, either with or without a weapon or instrument, shall be guilty of a *misdemeanor*, and be liable to penal servitude for five years, or imprisonment, with or without hard labour, not exceeding two years (*c*). Moreover (by sect. 28) whoever shall unlawfully and maliciously by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do other grievous bodily harm to any person, shall be guilty of felony and be punishable as for an attempt to murder, with the addition of whipping, provided the offender be a male under the age of sixteen, if the court shall so direct. And the same penal consequences will attach to whomsoever shall so cause gunpowder or other explosive substance to explode, or who shall send or deliver to, or cause it or other offensive, dangerous or noxious thing to be received or taken by any person, or who shall put or lay at any place, or cast or throw at or on, or otherwise apply to any person, corrosive fluid or other destructive or explosive substance with intent (in any of the above cases) to burn, maim, disfigure or disable any person or to do him some grievous bodily harm, *whether any bodily injury be effected or not* (*d*). And the same punishment, except that the term of penal servitude may not exceed fourteen years, may be inflicted (by sect. 30) on whomsoever shall so place or throw in, into, upon, against or near any building, ship or vessel, gunpowder or other explosive substance, with intent to do bodily injury to any person, *whether an explosion take place or bodily injury be inflicted or not.* Moreover, whosoever with intent to *enable himself or any other person to commit*, or to *assist another person in committing*,

(*c*) 24 & 25 Vict. c. 100, s. 20; 27 & 28 Vict. c. 47. It may be here mentioned (and the remark applies to *all* of the indictable misdemeanors mentioned in this chapter), that the person convicted may, if the court shall think fit, either in addition to or in lieu of any other punishment, be fined and required to find sureties to keep the peace, or for good behaviour. 24 & 25 Vict. c. 100, s. 71.

(*d*) Sect. 29.

any indictable offence, shall by any means whatsoever attempt to choke, suffocate or strangle another person, or shall, by means calculated to choke, suffocate or strangle, attempt to render any other person insensible, unconscious or incapable of resistance; or shall unlawfully apply or administer to, or cause to be taken by, or attempt to apply or administer to, or attempt to cause to be administered to or taken by any person, chloroform, laudanum, or other stupefying or overpowering drug, matter or thing,—shall be guilty of felony, and be punishable as for an attempt to murder (*e*)—with the addition of *whipping* if the offender be a male, and the court shall so direct (*f*). And whoever shall unlawfully and maliciously prevent any person on board of, or having quitted a ship or vessel in distress, wrecked or stranded, in his endeavour to save his life; or who shall prevent or impede any one in his endeavour to save the life of any such person on board or escaping from such vessel, shall be guilty of felony, and be punishable as for an attempt to murder (*g*). And the same penalties (except that the extreme limit of the term of penal servitude is ten years instead of life) are attached to the crime of administering or causing to be administered to any one, poison or other destructive or noxious thing, so as thereby to endanger his life or inflict on him grievous bodily harm (*h*),—and such administration, although in fact neither life be endangered nor grievous harm inflicted, yet if with intent *to injure, aggrieve or annoy* such person, is a *misdemeanor*—and made punishable with penal servitude for five years, or imprisonment, with or without hard labour, for not more than two years (*i*).

(*e*) 24 & 25 Vict. c. 100, ss. 21, 22. As to such punishment, vide sup. p. 78.

(*f*) 26 & 27 Vict. c. 44.

(*g*) 24 & 25 Vict. c. 100, s. 17.

(*h*) Sect. 23. If, on indictment for this felony, the jury are satisfied that the prisoner was guilty of the misdemeanor mentioned in sect. 24, they may convict accordingly (sect. 25).

(*i*) 24 & 25 Vict. c. 100, s. 24; 27 & 28 Vict. c. 47.

IV. *Procuring miscarriage, and concealment of birth.*—To kill a child in the mother's womb is, as formerly observed, no murder (*j*). It was at one period, however, made by a statute of George the third a capital felony to administer a destructive thing to procure the miscarriage of a woman quick with child; and if she should not be proved to have been quick with child, it was a felony punishable with transportation (*k*). But by a later statute the nature of the offence and the degree of punishment were made no longer to turn on the fact of being *quick* with child, but in all cases penal servitude for life might be awarded (*l*). This offence is now, however, provided against by 24 & 25 Vict. c. 100, s. 58; which awards the term of penal servitude for life, or for a term not less than five years (*m*),—or imprisonment (with or without hard labour and solitary confinement) for a term not exceeding two years,—to any woman who, being with child, shall, with intent to procure her own miscarriage, unlawfully administer to herself poison or other noxious thing, or use any instrument or other means for that purpose; or to any person whomsoever who, with a similar intent, shall unlawfully administer to a woman (whether she be with child or not), or cause to be taken by her, poison or other noxious thing, or who shall use any instrument or other means with intent to procure her miscarriage; and all such practices are declared to be felonies (*n*). And further, it is provided that whosoever shall supply or procure any such poison, thing, or instrument, knowing that the same is intended to be unlawfully used or employed to procure the miscarriage of a woman, whether she be with child or not, shall be guilty of a misdemeanor, and punishable with penal servitude for five years, or imprisonment, with or without

(*j*) Vide sup. p. 69.

(*k*) 43 Geo. 3, c. 58; and see 9 Geo. 4, c. 31, s. 13.

(*l*) See 7 Will. 4 & 1 Vict. c. 85, s. 6, repealed by 24 & 25 Vict. c. 95.

(*m*) See 27 & 28 Vict. c. 47.

(*n*) It is to be observed that if in such a case the woman should die, the offence would be murder. (See 1 Hale, P. C. 465, cited sup. p. 72.) And one Heaps was hanged for it in the year 1875.

hard labour, not exceeding two years (*o*). And it is also a misdemeanor punishable with imprisonment as just mentioned, for any person, by secret disposition of the dead body of a child whereof a woman has been delivered, to endeavour to *conceal* its birth, whether it died before or afterwards (*p*).

V. Another offence immediately affecting the personal security of individuals, is that of the *abduction of females*. One species of this offence, vulgarly called stealing an heiress,—viz. forcibly carrying off any woman, "having substance in goods or lands, or being heir apparent to her ancestor" (the same being followed by her marriage or defilement),—was made a capital felony by the statutes 3 Hen. VII. c. 2, and 39 Eliz. c. 9 (*q*). But these enactments are repealed; and the existing provision on this subject is contained in 24 & 25 Vict. c. 100; the 53rd section of which enacts, that where a woman of any age shall have any interest, legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate,—or shall be an heiress presumptive, or co-heiress, or presumptive next of kin to a person having such interest,—it shall be felony in anyone who shall, from motives of lucre (*r*), take away or detain her against her will, with intent to marry or carnally know her; or who shall cause her to be married or carnally known by any other person —or who (with a like intent) shall fraudulently allure, take away or detain a woman in such position if she be *under the age of twenty-one*, out of the possession and against

(*o*) 24 & 25 Vict. c. 100, s. 59; 27 & 28 Vict. c. 47.

(*p*) 24 & 25 Vict. c. 100, s. 60 (see The Queen *v.* Brown, Law Rep., 1 C. C. R. 244). At one period of the law, if the child would have been a bastard, and its mother endeavoured to conceal her delivery of a child, by putting away the body or the like, it was *murder*, unless, indeed, she was able to prove by a witness that the child was born dead. See 4 Bl. Com. p. 198; 21 Jac. 1, c. 27; 43 Geo. 3, c. 58.

(*q*) See also 4 & 5 Ph. & M. c. 8.

(*r*) See R. *v.* Barratt, 9 Car. & P. 387.

the will of her father or mother, or other person having her lawful care or charge; and the offender (in any of the above cases) is punishable by penal servitude for fourteen years, or not less than five (*r*), or by imprisonment, with or without hard labour, not exceeding two years: and shall, moreover, be incapable of taking any of her estate, interest or property; which (if marriage has taken place) shall be settled in such manner as shall be appointed in chancery. The same punishments are awarded to whomsoever shall *by force* take away or detain against her will a woman of *any* age, with intent to marry or defile her (*s*). And unlawfully to take or cause to be taken out of the possession and against the will of her parents or guardian, an unmarried girl under the age of sixteen, is a *misdemeanor*, punishable with imprisonment to the extent of two years, with or without hard labour—and that, though no such intent as above mentioned can be shown (*t*).

VI. [Another offence, also against the female part of the subjects of the realm, but attended with greater aggravations even than that of forcible marriage, is the crime of *rape*, *raptus mulierum*, that is, the carnal knowledge of a woman forcibly and against her will (*u*). This, by the Jewish law, was punished with death, in case the damsel was betrothed to another man: and in case she was not betrothed, then the heavy fine of fifty shekels was to be paid to the damsel's father; and she was to be the wife

(*r*) See 27 & 28 Vict. c. 47.

(*s*) 24 & 25 Vict. c. 100, s. 54.

(*t*) Sect. 55. See R. *v.* Meadows, 1 Car. & Kir. 399; R. *v.* Robins, ib. 456; Manklelow's case, 1 Dearsley's C. C. R. 159; Reg. *v.* Timmins, 9 W. R. (C. C. R.) 56. It may be remarked that, when under the age of sixteen, the girl's *consent* is immaterial; nor is it a defence that the person charged bonâ fide and reasonably believed her to have been of that age. (The Queen *v.* Prince, Law Rep., 2 C. C. R. 154.)

(*u*) 4 Bl. Com. 210. See The Queen *v.* Fletcher, 28 L. J. (M. C.) 85, from which case it appears that "without her *consent*" would be the more proper definition of this crime.

[of the ravisher all the days of his life, without his having that power of divorce which was in general permitted by the Mosaic law (*x*).

The civil law punished the crime of ravishment with death and confiscation of goods; under which term it includes both the offence of forcible abduction or taking away a woman from her friends, of which we last spoke, and also the present offence of forcible dishonouring them; either of which, without the other, is in that law sufficient to constitute a capital crime (*y*). Also the stealing away a woman from her parents or guardians and debauching her, was made equally penal by the emperor's edict, whether she consent or is forced; "*sive volentibus, sive nolentibus mulieribus tale facinus fuerit perpetratum.*" And this, in order to take away from women every opportunity of offending in this way; whom the Roman law supposes never to go astray, without the seduction and arts of the other sex: and therefore by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women. "*Si enim ipsi raptores metu, vel atrocitate pœnæ, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti, sive nolenti, peccandi locus relinquetur; quia hoc ipsum* velle *mulierum, ab insidiis nequissimi hominis, qui meditatur rapinam, inducitur. Nisi etenim eam solicitaverit, nisi odiosis artibus circumvenerit, non faciet eam velle in tantum dedecus sese prodere.*" But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only; and therefore makes it a necessary ingredient, in the crime of rape, that it must be against the woman's consent.

Rape was punished by the Saxon laws, (particularly those of king Athelstan,) with death (*z*); which was also agreeable to the old Gothic or Scandinavian constitu-

(*x*) Deut. xxii. 25.
(*y*) Cod. 9, tit. 13.
(*z*) Bracton, l. iii. c. 28.

[tion (*a*). But this was afterwards thought too hard; and in its stead another severe, but not capital, punishment, was inflicted by William the Conqueror; viz., castration and loss of eyes (*b*); and this continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accusations, it was then the law (*c*), that the woman should, immediately after, "*dum recens fuerit maleficium*," go to the next town; and there make discovery to some credible persons of the injury she has suffered; and, afterwards, should acquaint the high constable of the hundred, the coroners, and the sheriff, with the outrage (*d*). This seems to correspond in some degree with the laws of Scotland and Arragon, which required that complaint must be made within twenty-four hours; though afterwards the time of limitation, in England, was extended to forty days (*e*). At present there is no time of limitation fixed; for, as it is now punished by indictment at the suit of the Crown, the maxim of law takes place that *nullum tempus occurrit regi;* but the jury will rarely give credit to a stale complaint. At one period, also, it was held for law, that the woman, by the consent of the judge and her parents, might redeem the offender from the execution of his sentence, by accepting him for her husband,—if he also was willing to agree to the exchange, but not otherwise (*f*).

In the third year of Edward the first, (by the statute Westm. 1, c. 13,) the punishment of rape was much mitigated: the offence itself of ravishing a damsel within age, that is, *twelve* years old, either with her consent or without, or of any other woman against her will, being reduced to a trespass, unless prosecuted by appeal within

(*a*) Stiernh. de Jure Sueon. l. iii. c. 2.

(*b*) LL. Guil. Conqu. c. 19.

(*c*) The law is so laid down by Hale, in respect of appeals of rape in his time. (1 Hale, P. C. 632.)

(*d*) Glanv. l. xiv. c. 6; Bract. l. iii. c. 28.

(*e*) See 3 Edw. 1, c. 13.

(*f*) Hawk. P. C. b. 1, c. 41, s. 7.

[forty days; and subjecting the offender only to two years' imprisonment and a fine at the king's will. But this lenity being productive of the most terrible consequences, it was, in the thirteenth year of Edward the first, again found necessary to make the offence of forcible rape, felony (*g*). And by statute 18 Eliz. c. 7, it was made felony without benefit of clergy.] All these enactments were afterwards repealed by 9 Geo. IV. c. 31; which however still made the offence a capital felony: but, by the provision in force at the present time, every person convicted of rape shall be guilty of felony and be liable to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years with or without hard labour (*h*).

[An infant under the age of fourteen years, is presumed by law incapable to commit a rape; and therefore cannot be found guilty of it (*i*);—for though in other felonies *malitia supplet ætatem*, as in some cases has been shown, yet as to this particular species of felony, the law supposes an imbecility of body as well as mind (*k*).

The civil law seems to suppose a prostitute, or common harlot, incapable of any injuries of this kind (*l*); not allowing any punishment for violating the chastity of her who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment: and therefore holds it to be felony to force even a concubine or harlot: because the woman may have forsaken that unlawful course of life (*m*); for,

(*g*) Stat. Westm. 2, c. 34.

(*h*) 24 & 25 Vict. c. 100, s. 48; 27 & 28 Vict. c. 47.

(*i*) See R. *v.* Jordan, 9 Car. & P. 118. The law is the same in the case of an assault with intent to commit a rape. (R. *v.* Eldershaw, 3 Car. & P. 396.)

(*k*) 1 Hale, P. C. 631; vide sup. p. 24.

(*l*) Cod. 9, 9, 22; Ff. 47, 2, 39.

(*m*) 1 Hale, P. C. 629; Hawk. P. C. b. 1, c. 41, s. 2.

[as Bracton well observes, "*licet meretrix fuerit antea, certe tunc meretrix non fuit, cum reclamando nequitiæ ejus consentire noluit*" (*n*).

As to the material facts requisite to be given in evidence and proved upon an indictment for rape, they are of such a nature that, though necessary to be known and settled for the conviction of the guilty and preservation of the innocent,—and therefore to be found in such criminal treatises as discourse of these matters in detail,—their discussion here would not be desirable. We shall therefore merely add upon this head, a few remarks from Sir Matthew Hale, with regard to the competency and credibility of witnesses, which may, *salvo pudore*, be considered.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far she is to be believed, must be left to the jury upon the circumstances of fact that occur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence and made search for the offender; if the party accused fled for it;—these and the like are concurring circumstances, which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed was where it was possible she might have been heard, and she made no outcry;— these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.] It is to be observed, that it has been held that she is not compellable, on her cross-examination, to answer the question whether she has not had previous connection with the prisoner or with other men (*o*); and if she does answer and replies in the negative, it seems that the accused is not at liberty

(*n*) L. 3, c. 27.

(*o*) See R. *v.* Hodgson, R. & R. C. C. 211.

to call persons to contradict her (*p*). But he is allowed, with the view of impugning her credibility, to produce proof that he had himself had connexion with her before the alleged rape (*q*), or that her character for chastity or decency is notoriously bad (*r*).

[Moreover, if the rape be charged to be committed on a young child, she may still be a competent witness if she hath sense and understanding to know the nature and obligations of an oath, or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it was thought by Sir M. Hale that she ought to be heard without oath, to give the court information (*s*): and others have contended that what the child told her mother or other relations may be given in evidence, since the nature of the case admits frequently of no better proof. With regard to these matters, however, it is now settled that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath; and that there is no determinate age at which the oath of a child ought either to be admitted or rejected (*t*). Yet where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place and circumstances;—in order to make out the fact, and that the conviction should not be grounded singly on the unsupported accusation of an infant of tender years. For in this, as in other cases, a witness may be competent, that is, may be admitted to be heard, and yet, after being heard, may prove not to be credible or such as the jury is bound to believe; for one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

(*p*) See The Queen *v.* Holmes, Law Rep., 1 C. C. R. 334.

(*q*) R. *v.* Martin, 6 Car. & P. 562.

(*r*) Stark. Ev. 1269, 1270.

(*s*) 1 Hale, P. C. 634.

(*t*) See R. *v.* Brasier, 1 Leach, C. L. 237.

["It is true," says Sir Matthew Hale, "that rape is a "most detestable crime; but it must be remembered that it "is an accusation easy to be made, and hard to be proved, "but harder to be defended by the party accused, though "innocent." The learned judge then relates two very extraordinary cases of malicious prosecution for this crime that had happened within his own observation, and concludes thus: "I mention these instances that we may be "the more cautious upon trials of offences of this nature, "wherein the court and jury may with so much ease be "imposed upon without great care and vigilance; the "heinousness of the offence many times transporting the "judge and jury with so much indignation, that they are "over hastily carried to the conviction of the person ac- "cused thereof, by the confident testimony of sometimes "false and malicious witnesses" (*u*).]

VII. We shall next mention a crime of the same general character as the forcible ravishment of a woman, and which in some cases is punishable with equal severity. We refer to the crime of *defiling or abuse of children;* and with regard to this, it is, in the first place, a felony punishable with penal servitude for life, or not less than five years, or imprisonment (with or without hard labour) for not more than two years, unlawfully and carnally to know and abuse any girl under the age of *twelve years* (*x*): and, secondly, it is a misdemeanor punishable with imprisonment, with or without hard labour, to the extent of two years, so to know and abuse any girl above the age of *twelve* and under the age of *thirteen*,—whether with or without her consent (*y*). Moreover, punishment by imprisonment, as last mentioned, may be inflicted on any person who shall be convicted of any

(*u*) 1 Hale, P. C. 635.

(*x*) 38 & 39 Vict. c. 94, s. 3. By this Act, 24 & 25 Vict. c. 100, ss. 4, 50 and 51, are repealed.

(*y*) 38 & 39 Vict. c. 94, s. 4.

attempt to have carnal knowledge of a girl under the age of twelve—even though she consent (*z*).

VIII. [*Kidnapping and child stealing.*—The forcible stealing away of a man, woman or child from their own country, and sending them into another, was capital by the Jewish (*b*) and also by the civil law (*c*). This is unquestionably a very heinous crime, as it robs the sovereign of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships; and the common law of England punished it with fine and imprisonment (*d*).] But our modern law on this head is reasonably much more severe; it being provided by 24 & 25 Vict. c. 100, s. 56, that whosoever shall unlawfully, either by force or fraud, lead, take, decoy or entice away, or detain any child under the age of *fourteen* years (*e*), with intent to deprive the parent, guardian, or other person having the lawful care or charge of such child, of its possession, or with intent to steal any article on its person;—or who shall, with any such intent as aforesaid, receive or harbour such child, knowing the same to have been so stolen or enticed;—shall be guilty of felony; and he is made liable to penal servitude for not more than seven or less than five years, or to be imprisoned, with or without hard labour, for any term not more than two years; and also, if a male under the age of sixteen, to be whipped, if the court shall so think fit (*f*).

(*z*) 24 & 25 Vict. c. 100, s. 52. As to the crime of abusing children, see R. *v.* Hughes, 1 Cox, Cr. C. 247; R. *v.* Ashbolt, 2 Cox, Cr. C. 115; R. *v.* Martin, 9 Car. & P. 213; R. *v.* Neale, 1 Car. & Kir. 391; R. *v.* Holcroft, 2 Car. & Kir. 341; R. *v.* Beale, Law Rep., 1 C. C. R. 10.

(*b*) Exod. xxi. 16.

(*c*) Ff. 48, 15, 1. In the civil law the offence of spiriting away and stealing men and children was called *plagium*, and the offenders *plagiarii*. (Ff. 48, 15, 1.)

(*d*) Raym. 474; 2 Show. 221; Skin. 47; 4 Bl. Com. 219.

(*e*) In the analogous provision contained in 9 Geo. 4, c. 31, s. 21 (now repealed), the age was fixed at *ten* years. As to the abduction of *an unmarried girl under the age of sixteen*, vide sup. 85.

(*f*) See 27 & 28 Vict. c. 47. A person bonâ fide claiming a right to the possession of the child, or to

IX. The offence of *abandoning* young children has also been provided against by the statute last mentioned; and it is enacted, that whoever shall unlawfully abandon or expose any child under the age of two years, in such manner that its life shall be endangered, or its health be permanently injured, or be likely to be so, shall be guilty of a misdemeanor, and punishable by penal servitude for five years, or imprisonment, with or without hard labour, for a term not exceeding two years (*g*). And in view of the same object, viz., the better protection of infant life, it has been since enacted by the 35 & 36 Vict. c. 38, that it shall not be lawful for any person to retain or receive for hire or reward more than one infant (or, in case of twins, more than two infants) under the age of one year, for the purpose of nursing or maintaining such infants apart from their parents for a longer period than twenty-four hours,—except in some house which has been duly *registered* under that Act. And if it shall be proved to the "local authority" under whose superintendence such houses are placed, that there has been serious neglect, or that the person registered is incapable of supplying the infants with proper food, or that the house has become unfit for the reception of infants, the house may be struck out of the register. And any offence under this Act may be prosecuted under the Summary Jurisdiction Acts (*h*).

X. *Unlawfully endangering railway passengers.*—Whoever shall unlawfully and maliciously put or throw on or across a railway any wood, stone or other thing; or displace any rail, sleeper or other thing, or turn any point

be its father or mother, is not within the above provision. (See 24 & 25 Vict. c. 100, s. 56.)

(*g*) 24 & 25 Vict. c. 100, s. 27; 27 & 28 Vict. c. 47. See R. *v.* Cooper, 1 Den. C. C. 459; R. *v.* Hogan, 2 Den. C. C. 277; R. *v.* Gray, 26 L. J. (N. S.) M. C. 203; The Queen *v.* Falkingham, Law Rep., 1 C. C. R. 222; *v.* White, ib. p. 311.

(*h*) The punishment may be imprisonment for not more than six months with or without hard labour, or a penalty not exceeding 5*l.* (35 & 36 Vict. c. 38, s. 9).

of machinery belonging to a railway; or show, hide or remove any signal or light; or do any other thing, with *intent to endanger the safety* of any person travelling or being on such railway (*i*)—or shall throw against or into a railway engine or carriage any wood, stone or other thing, with a similar intent (*j*)—he shall, in any of the above cases, be guilty of felony: and he is liable to penal servitude for life, or not less than five years; or to be imprisoned, with or without hard labour, for any term not exceeding two years (*k*). And, moreover, whoever by any unlawful act, or wilful omission or neglect, shall endanger or cause to be endangered, or shall aid or assist in endangering or in causing to be endangered, the safety of any person conveyed by or being on a railway, shall be guilty of a misdemeanor, and punishable by imprisonment, with or without hard labour, to the extent of two years (*l*).

XI. *Setting spring-guns or engines to destroy or injure trespassers.*—It is enacted by 24 & 25 Vict. c. 100, that whoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, *with intent to destroy such life or inflict such harm*, upon a trespasser or other person coming in contact therewith,—shall be guilty of a misdemeanor, and be punishable with penal servitude for five years, or imprisonment, with or without hard labour, to the extent of two years (*m*).

(*i*) 24 & 25 Vict. c. 100, s. 32. In cases under this section, the offender, if a male under the age of sixteen, may be sentenced to be *whipped*, in addition to the punishments mentioned in the text

(*j*) Sect. 33.

(*k*) Sects. 32, 33; 27 & 28 Vict. c. 47.

(*l*) 24 & 25 Vict. c. 100, s. 34. See R. *v.* Bradford, 29 L. J. (N. S.), M. C. 171.

(*m*) 24 & 25 Vict. c. 100, s. 31; 27 & 28 Vict. c. 47. Prior to 7 & 8 Geo. 4, c. 18, s. 1 (repealed by 24 & 25 Vict. c. 95), the mere act of setting such instruments with intent to destroy trespassers, if sufficient notice were given to the public that they were so set, was

There is, however, a proviso, that the said enactment shall not extend to gins or traps such as are usually set with the intent of destroying vermin; or to spring-guns, man-traps, or other engines, set in a dwelling-house for the protection thereof from sunset to sunrise (*n*).

XII. *Assaults, batteries,* and *false imprisonment* shall next be considered. With regard to the nature of these offences in general, we have nothing further to add to what has been already observed in the preceding book of these Commentaries; when we considered them as civil injuries, for which a satisfaction is given to the party aggrieved (*o*). But taken in a public light as a breach of the peace, a common assault, even though not occasioning any actual bodily harm, is a misdemeanor, and punishable with imprisonment, with or without hard labour, to the extent of one year (*p*); while if it has occasioned such harm, it is punishable by penal servitude for five years, or imprisonment to the extent of two years, with or without hard labour (*q*). But, in some cases, assaults are punished in a still severer manner and degree: that is when they are committed with any atrocious design,—as, for example, in case of an assault with intent to murder, in which case we may remember that penal servitude *for life* may be awarded (*r*).

Moreover, a variety of assaults of different kinds are provided against by particular enactments (*s*). Thus, amongst

not an indictable offence. (Elott *v.* Wilks, 3 B. & Ald. 312, 314.) As to the right of *action* by a person who sustains injury from an engine of this description, see Jordan *v.* Crump, 8 Mee. & W. 782; Wootton *v.* Dawkins, 2 C. B. (N. S.) 412.

(*n*) 24 & 25 Vict. c. 100, s. 31.

(*o*) Vide sup. bk. v. ch. VIII.

(*p*) Sect. 47. Before this provision, "hard labour" could not be inflicted for a common assault.

(*q*) Sect. 47; 27 & 28 Vict. c. 47.

(*r*) Vide sup. p. 78.

(*s*) See also the following provisions:—13 & 14 Vict. c. 101, s. 9, as to assaults on workhouse or relieving officers: 17 & 18 Vict. c. 104, s. 206, as to masters of British ships wrongfully forcing a seaman or apprentice ashore, or leaving him behind, &c.: 24 & 25 Vict. c. 100, s. 39, as to assaults with intent to obstruct the sale or

others (for it would be tedious to attempt an enumeration of all), an assault on a magistrate, or any other person in lawful authority while preserving *wreck* or goods cast on shore, is a misdemeanor punishable with penal servitude to the extent of seven years, or imprisonment to the extent of two years, at the discretion of the court (*t*). So, also, to obstruct or assault a clergyman while in the discharge of the duties of his calling (*u*), or to assault any person with intent to commit felony (*v*), or to assault any female indecently (*x*),—are all made punishable by two years' imprisonment with or without hard labour, even though no actual bodily harm may have been occasioned (*y*).

We may observe, too, that common assaults may be, and continually are, disposed of by the justices of the peace sitting at petty sessions, in the exercise of their summary jurisdiction, and not by way of indictment; and that, when so disposed of, the punishment is of a lighter description, and consists in a fine not exceeding £5, or imprisonment (with or without hard labour) to the extent of two months (*y*); and, in certain cases, even some species of *aggravated* assaults may be heard and determined by the justices (*z*). But, for further information hereon, we must refer the reader to the chapter on Summary Convictions, in a subsequent part of the work.

free passage of grain, &c.; sect. 40, as to assaults on seamen and others, with intent to prevent them from working at their trades: 24 & 25 Vict. c. 100, s. 38, and 34 & 35 Vict. c. 112, s. 12, as to assaults on constables.

(*t*) 24 & 25 Vict. c. 100, s. 37.

(*u*) Sect. 36.

(*v*) Sect. 38.

(*x*) Sect. 52. As to other indecent assaults, vide sup. pp. 85, 91, et post ch. VII. As to security being sometimes required for the due prosecution of such charges, see 22 & 23 Vict. c. 17, and 30 & 31 Vict. c. 35.

(*y*) Sect. 42. In case of violence or threats of violence to persons engaged in the exercise of certain *trades and occupations*, the offender may, under 24 & 25 Vict. c. 100 s. 39, be kept to hard labour for as long as *three* months, on being summarily convicted.

(*z*) See 24 & 25 Vict. c. 100, s. 43. In these cases the fine may be as high as £20, and the imprisonment may extend to *six* months.

XIII. We shall next notice that offence which is called *bigamy* (*y*), and which consists of a second marriage (*z*) by one who has a former husband or wife still living (*a*). [Such second marriage is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the legislature has thought it just to make it felony; by reason of its being so great a violation of the public economy and decency of a well-ordered State (*b*). For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations; the fallaciousness of which has been

(*y*) It may be incidentally observed here that "bigamy," according to the canonists, consisted in marrying two virgins successively, one after the death of the other; or in once marrying a widow. They who contracted such marriages were esteemed incapable of orders, &c.; and by a canon of the council of Lyons, A.D. 1274, held under Pope Gregory the tenth, were "*omni privilegio clericali nudati, et coërcioni fori secularis addicti.*"—(6 Decretal. l. 12.) This canon was adopted and explained in England by 4 Edw. 1 (Stat. de Bigamis); and *bigamy* thereupon became no uncommon counterplea to the claim of benefit of clergy. (M. 40 Edw. 3, 42; M. 11 Hen. 4, 11, 48; M. 13 Hen. 4, 6; Staundf. P. C. 134.) The cognizance of the plea of *bigamy* was declared by stat. 18 Edw. 3, st. 3, c. 2, to belong to the court christian, like that of *bastardy*. But by stat. 1 Edw. 6, c. 12, s. 16, *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21; Dy. 201.

(*z*) Blackstone says (vol. iv. p. 163) that the offence of bigamy "is more justly denominated *poly-gamy*, or having a plurality of wives at once:" and he objects to the term "bigamy" as describing the offence; because it "properly signifies being twice married."

(*a*) 3 Inst. 88. It is to be observed, that, for the purposes of the 20 & 21 Vict. c. 85, "to amend the law relating to divorce and matrimonial causes in England," the term "bigamy" is to be taken to mean "the marriage of any person being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of her Majesty, or elsewhere."

(*b*) It has been held that cohabitation in a country where polygamy is lawful and between those who profess a faith which allows of polygamy, will not be recognized as lawful marriage in the English courts. See Hyde *v.* Hyde and Woodmansee, Law Rep., 1 P. & D. 130; and the remarks on this case contained in the Criminal Code Bill Commission Report, p. 25.

[fully proved by many sensible writers; but in northern countries, the very nature of the climate seems to reclaim against it:—it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us, "*prope soli barbarorum, singulis uxoribus contenti sunt*" (*c*).] And with us in England, it is enacted by 24 & 25 Vict. c. 100, that whosoever, being married, shall marry any other person during the life of the former husband or wife, (whether the second marriage shall have taken place in England, Ireland or elsewhere,) shall be guilty of felony (*d*); and is liable to penal servitude for not more than seven nor less than five years, or to be imprisoned with or without hard labour, for not more than two years (*e*). It is to be observed, however, that the first wife, in this case, shall not be admitted as a witness against her husband, because she is the true wife; though the second may, because she is indeed no wife at all (*f*); and so *vice versâ* of a second husband: and it is held necessary to prove that the first marriage was duly solemnized (*g*); mere proof of cohabitation not being sufficient (*h*). Moreover, the above enactment does not extend to the following cases (*i*). 1. That of a second marriage contracted out of England or Ireland, by any other than a subject of Her Majesty (*k*). 2. That of a person marrying a second time, whose husband or wife shall have been continually absent for the space of seven years immediately preceding

(*c*) De Mor. Germ. 18.

(*d*) The offence is committed though the second wife (or husband) be within the prohibited degrees of affinity. (The Queen *v.* Allen, Law Rep., 1 C. C. R. 367.)

(*e*) 24 & 25 Vict. c. 100, s. 57. (See 27 & 28 Vict. c. 47.) The offender may also, if the court see fit, be bound over with sureties to keep the peace.

(*f*) 1 Hale, P. C. 693; 1 East, P. C. c. 12, s. 9; Peat's case, 2 Lewin, 288.

(*g*) As to the evidence of such marriage, see The Queen *v.* Cresswell, Law Rep., 1 Q. B. D. 446.

(*h*) See R. *v.* James, R. & R. C. C. 17; R. *v.* Morton, ib. 19; R. *v.* Butler, ib. 61; R. *v.* Bowen, 2 C. & K. 227.

(*i*) 24 & 25 Vict. c. 100, s. 57.

(*k*) As to this exception, see Topping's case, 1 Dearsley's C. C. R. 647.

the second marriage, and shall not have been known by such person to be living within that time (*l*). 3. That of a person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage. 4. That of a person whose former marriage shall have been declared void, by the sentence of any court of competent jurisdiction (*m*). In reference, however, to the second of these cases, it is to be observed that the second marriage is, under the circumstances referred to, a *nullity*, although it be attended with no penal consequences.

XIV. The last offence to which we shall refer in this chapter, as it not only amounts in many instances to an incitement to break the peace, but is also an offence against personal rights—which include, it may be remembered, a man's right to the security of his reputation (*n*)—is the *publication of a libel.* Of libel, indeed, considered as a civil injury, we have already said so much in a former part of the work, as to preclude the necessity on the present occasion for any copious discussion of the offence of its publication (*o*). It may be right, however, to remark in this place, that, by the provisions of 6 & 7 Vict. c. 96 (*p*), it is enacted, that if any person shall publish (or threaten to publish) any libel (or directly or indirectly propose to abstain from printing or publishing, or offer to prevent the printing or publishing, of any matter touching any person) with intent

(*l*) See The Queen *v.* Briggs, 26 L. J. (M. C.) 7; The Queen *v.* John Curgerwen, Law Rep., 1 C. C. 1. It is remarked in the Criminal Code Bill Commission Report (p. 25), that the above enactment in 24 & 25 Vict. c. 100, is so worded as to have given rise to a difference of judicial opinion as to whether it does or does not, from motives of policy, make it a crime to marry again during the life of the husband or wife, though in the *bonâ fide* and reasonable belief that the first husband or wife was dead, unless seven years had elapsed since he or she was last heard of.

(*m*) Duchess of Kingston's case, 11 St. Tr. 262; 1 Leach, 146; Hawk. P. C. b. 1, c. 42, s. 11.

(*n*) Vide sup. vol. I. p. 143.

(*o*) Vide sup. bk. v. ch. VII.

(*p*) This Act was amended by 8 & 9 Vict. c. 75.

to extort any money, security for money, or valuable thing from such person or any other; or with intent to induce any person to confer or procure any appointment or office of profit or trust;—he shall be liable to imprisonment, with or without hard labour, for a term not exceeding three years (*q*). Also, that if any person shall maliciously publish any defamatory libel, knowing the same to be false, he may be imprisoned for a term not exceeding two years, and pay such fine as the court shall award (*r*). And that if any person (though without such knowledge) shall maliciously publish any defamatory libel, he shall be liable to fine or imprisonment, or both, as the court shall award, such imprisonment not to exceed one year (*s*).

It is also necessary to observe, that besides defamatory libels, the term of libel legally includes such writings as are of a blasphemous, treasonable, seditious, or immoral kind; the publication of any of which is a misdemeanor, and subjects the person by whom it was composed, written, printed or published, to fine and imprisonment (*t*). And it was provided by 60 Geo. III. & 1 Geo. IV. c. 8, as to libels of a blasphemous or seditious kind, that in every case in which there shall be judgment against any person for composing, printing, or publishing the same,—the court may order the seizure and detaining of all copies of the libel which shall be in the possession of such person; or in the possession of any other person for his use. And upon proper evidence being given of such possession, it shall be lawful for any justice of the peace, constable, or other peace officer, acting under such order, to search for such copies, in any house, building or place belonging to the person named in such order: and to enter therein (in the

(*q*) 6 & 7 Vict. c. 96, s. 3.

(*r*) Sect. 4.

(*s*) Sect. 5.

(*t*) As to blasphemous libels, see 4 Bl. Com. p. 451, note by Christian. The Report on the Criminal Code Bill states (p. 21) that the commissioners "consider that the essence of the offence (regarded as a subject for criminal punishment) lies in the outrage which it inflicts on the religious feelings of the community, and not in the expression of erroneous opinions."

day time) by force, if admission be refused or unreasonably delayed.

[Under the Roman law, libel considered as a criminal offence was treated, at certain periods, with more severity than with us. By the law of the Twelve Tables, libels which affected the reputation of another, were made a capital offence; but before the reign of Augustus, the punishment became corporal only (*u*). Under the Emperor Valentinian it was again made capital not only to write libels, but to publish or even to omit to destroy them (*x*). But our law, in this and many other respects, corresponds rather with the middle age of Roman jurisprudence, when liberty, learning and humanity were in their full vigour; and exhibits a moderation sufficient to protect it from any imputation of infringing the *liberty of the press*. This liberty, when rightly understood, consists in laying no *previous* restraints upon publications; but not in freedom from censure for criminal matter, when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution (*y*), is to subject all freedom of senti-

(*u*) ——— "*Quinetiam lex Pœnaque lata, malo quæ nollet carmine quenquam Describi:—vertere modum formidine* fustis."—Hor. ad Aug. 152.

(*x*) Cod. 9, 36.

(*y*) The art of printing, soon after its introduction, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the Crown. It was therefore regulated with us by royal proclamations, prohibitions, charters of privilege and of licence, and, finally, by the decrees of the Court of Star Chamber, which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles the first, after their rupture with that prince, assumed the same powers as the Star Chamber exercised with respect to licensing books; and in 1643, 1647, 1649

[ment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish, as the law does at present, any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.]

and 1652, issued their ordinances for that purpose, founded principally on the Star Chamber decree of 1637. (See Scobell, i. 44, 134; ii. 88, 230.) In 1662 was passed the statute 13 & 14 Car. 2, c. 33, which, with some few alterations, was copied from the parliamentary ordinances. This Act expired in 1679, but was revived by statute 1 Jac. 2, c. 17, and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24; but though frequent attempts were made by government to revive it in the subsequent part of that reign (Com. Journ. 11 February, 1694, 26 November, 1695, 22 October, 1696, 9 February, 1697, 31 January, 1698), yet the parliament resisted it so strongly that it finally expired, and the press became properly free in 1694, and has ever since so continued. This subject is also alluded to sup. bk. IV. pt. III. ch. XI.

CHAPTER V.

OF OFFENCES AGAINST RIGHTS OF PROPERTY OR ARISING OUT OF CONTRACT.

THE next class of crimes that we propose to consider are such as affect *property;* in considering which we shall notice, first, offences which more immediately affect houses or other property connected with land; and, next, offences against property in general, including offences against rights arising out of contract.

And, first, with respect to offences against houses, &c.

I. *Arson, ab ardendo,* is the malicious and wilful burning of the house or outhouse of another man. [This is an offence of very great malignity, and much more pernicious to the public than simple theft; because of the terror and confusion which necessarily attend it; and, also, because in simple theft the thing stolen only changes its master, but still remains *in esse* for the benefit of the public: whereas, by burning, the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which, too, it is often the cause: since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity, persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reason the civil law punished with death, such as maliciously set fire to houses in towns and contiguous to others; but was more

[merciful to such as only fired a cottage or house standing by itself (*a*).

Our English common law also distinguishes with much accuracy upon this crime; and, therefore, we will inquire, first, what is such a house as may be the subject of this offence; next, wherein the offence itself consists, or what amounts to a burning of such house; and, lastly, how the offence is punished.

Not only the bare dwelling-house, but all outhouses that are parcel thereof,—though not of necessity contiguous thereto, or under the same roof,—as barns and stables, may be the subject of arson (*b*). The offence may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief be done but to one's own, it did not, at common law, amount to felony, though the fire was kindled with intent to burn another's (*c*). For, by the common law, no intention to commit a felony, amounts to the same crime; though it now does, in some cases, by particular statutes. However, such wilful firing one's house, *in a town*, was always a high misdemeanor, and punishable by fine, imprisonment, and perpetual sureties for the good behaviour (*d*); and if a landlord or reversioner set fire to his own house, of which another was in possession under a lease from himself, or from those whose estate he hath, it was accounted arson; for, during the lease, the house is the property of the tenant (*e*).

As to what shall be said to be a *burning* so as to amount to arson, a bare intent, or attempt to do it, by actually setting fire to a house, unless it absolutely burns, does not fall within the description of *incendit et combussit;* which were words necessary, in the days of law-Latin, to all indictments of this sort (*f*); but the burning and con-

(*a*) Ff. 48, 19, 28, s. 12.
(*b*) 1 Hale, P. C. 567.
(*c*) Cro. Car. 377; 1 Jon. 351.
(*d*) 1 Hale, P. C. 568; Hawk. P. C. b. 1, c. 39, s. 3; 2 East, P. C. c. 21, s. 7.
(*e*) Fost. 115.
(*f*) R. *v.* Russell, 1 Car. & M. 541.

[suming of any part is sufficient, though the fire be afterwards extinguished (*g*). Also it must be a *malicious* burning, otherwise it is only a trespass; and, therefore, no negligence or mischance amounts to it (*h*).

The *punishment* of arson was death by our antient Saxon laws (*i*); and in the reign of Edward the first, this sentence was executed by a kind of *lex talionis;* for the incendiaries were burnt to death (*k*), as they were also according to the Gothic constitutions (*l*). The statute 8 Hen. VI. c. 6, made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason; but it was again reduced to an ordinary felony, by the general Acts of Edward the sixth and Queen Mary (*m*). Moreover the offence of arson was denied the benefit of clergy by statute 23 Hen. VIII. c. 1. But that statute was repealed by 1 Edw. VI. c. 12: and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute 4 & 5 Ph. & M. c. 4, which expressly denied the benefit to an accessory before the fact (*n*).]

The offence which we have here described is that of arson as it stood at *common law;* but the antient doctrines as to this offence (which it will be observed had reference almost exclusively to the burning of *houses*) have now lost much of their importance, specific enactments having been passed by the legislature in reference to almost every case of criminal firing. The existing provisions on this head are as follows.

By 24 & 25 Vict. c. 97, s. 2 (*o*), whoever shall un-

(*g*) Hawk. P.C. b. 1, c. 39, ss. 16, 17.
(*h*) 1 Hale, P. C. 569.
(*i*) LL. Inæ, c. 7.
(*k*) Britt. c. 9.
(*l*) Stiern. de Jure Goth. l. 3, c. 6.
(*m*) 1 Edw. 6, c. 12, and 1 Mary, sess. 1.
(*n*) 11 Rep. 35; 2 Hale, P. C. 346, 347; Fost. 336; and see 9 Geo. 1, c. 22, now repealed by 7 & 8 Geo. 4, c. 27.
(*o*) By 24 & 25 Vict. c. 95, the provisions with regard to this species of arson, contained in 7 Will. 4 & 1 Vict. c. 89, s. 2, are repealed. By that Act the punishment was death.

lawfully and maliciously set fire to a dwelling-house, any person being therein, shall be guilty of felony, and is made liable to penal servitude for life, or not less than five years (*r*), or to imprisonment for not more than two years, with or without hard labour, or solitary confinement; and if the offender be a male under the age of sixteen, he may also be sentenced to be whipped (*s*). And the same punishments are attached to the felonious offence of so setting fire to a church, chapel, meeting-house, or other place of divine worship (*t*);—and (provided the intent be to injure or defraud any person) to the crime of feloniously firing a house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hopoast, barn, storehouse, granary, pens, shed, or fold; or any building or erection used in a farm, or in carrying on any trade or manufacture, whether in possession of the offender or other person (*u*);—and also to the felonious offence of firing a station or other building belonging to a railway, port, dock, harbour, canal, or other navigation (*v*); or any kind of building (other than those already specified) belonging to the Queen, to a county, riding, division, city, borough, poor-law union, parish or place, or to any university, college or hall, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution (*x*).

As to other buildings not specified as above, the offence of setting fire to them unlawfully and maliciously, is somewhat less penal; being a felony punishable with penal ser-

(*r*) See 27 & 28 Vict. c. 47.

(*s*) In this and all other felonies punishable under 24 & 25 Vict. c. 97, the offender may in addition to any other punishment, be required to find sureties for keeping the peace; or, in default, is liable to additional imprisonment to the extent of one year. (Sect. 73.)

(*t*) Sect. 1.

(*u*) Sect. 3. As to what is an "outhouse," see R. *v.* James, 1 Car. & Kir. 303; R. *v.* England, ib. 533.

(*v*) Sect. 4. The previous enactment as to this, contained in 14 & 15 Vict. c. 19, s. 8, was repealed by 24 & 25 Vict. c. 95.

(*x*) 24 & 25 Vict. c. 97, s. 5.

vitude to the extent of fourteen years instead of life, or else by such imprisonment as already mentioned (*y*).

It is also enacted, that it shall be felony, and punishable as last mentioned, to *attempt* by any overt act to set fire to a building, or any matter or thing in, against, or under a building, under such circumstances that if the firing were accomplished the offence would amount to felony (*z*).

With regard to arson other than that of *buildings*,—it is enacted by the same statute that unlawfully and maliciously to set fire to any *stack* of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of other cultivated vegetable produce; or stack of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood or bark, or steer of wood or bark; shall be equally penal as firing any of the buildings above specified (*a*): but in the case of so setting fire to any *crop* of hay, grass, corn, grain or pulse, or cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, the punishment (if by way of penal servitude) is limited to the term of *fourteen years* instead of life (*b*); and to the term of *seven years*, if the offence be *attempted* by overt act but not completed,—under such circumstances that if the firing were effected, the offender would be guilty of felony (*c*).

Finally, to fire any *coal mine* (*d*),—or *ship* or *vessel* (*e*), —is made equally penal with setting fire to one of the buildings specified in the Act. And an attempt to do so by an overt act, is also severely punishable, the term of penal servitude being in that case fourteen years (*f*).

(*y*) 24 & 25 Vict. c. 97, s. 6. (See The Queen *v.* Manning, Law Rep., 1 C. C. R. 338.)

(*z*) Sects. 7, 8. (See The Queen *v.* Child, Law Rep., 1 C. C. R. 307.)

(*a*) Sect. 17. To fire a barn in a field, if filled with hay or corn, or a stack of corn, was also accounted as arson at *common law*. (3 Inst. 67; Hawk. P. C. b. 1, c. 39, s. 2.)

(*b*) Sect. 16.

(*c*) Sect. 18.

(*d*) Sect. 26.

(*e*) Sects. 42, 43.

(*f*) Sect. 27.

II. *Burglary*, or nocturnal housebreaking, *burgi latrocinium*, which, by our antient law, was called *hamesecken*, has always been looked upon as a very heinous offence (*g*). For it always tends to occasion a frightful alarm, and often leads by natural consequence to the crime of murder itself. [Its malignity also is strongly illustrated by considering how particular and tender a regard is paid by the law of England to the immunity of a man's house; which it styles his castle, and will never suffer to be violated with impunity: agreeing herein with the sentiments of antient Rome, as expressed in the words of Tully, "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" (*h*). For this reason no outward doors can, in general, be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private. Hence, also, in part arises the animadversion of the law upon eavesdroppers, nuisancers, and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully, (at least if they do not exceed eleven,) without danger of raising a riot, rout or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case (*i*).

The definition of a burglar, as given us by Sir Edward Coke, is "he that by night breaketh and entereth into a "mansion-house, with intent to commit a felony" (*j*). In which definition there are four things to be considered—the *time*, the *place*, the *manner*, and the *intent*.

The *time* must be by night, and not by day; for in the daytime there is no burglary. We have seen in the case of justifiable homicide, how much more heinous is an attack by night, rather than by day; for one who is attacked by night may kill his assailant with impunity (*k*). As to

(*g*) 4 Bl. Com. 223.
(*h*) Pro Domo, 41.
(*i*) 1 Hale, P. C. 547. As to riots, routs, and unlawful assemblies, vide post, c. VI.
(*j*) 3 Inst. 63.
(*k*) Vide sup. p. 49.

[what is reckoned night and what day for this purpose,—antiently, the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion afterwards was, that if there were daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it was no burglary (*l*). But this did not extend to moonlight, for then many midnight burglaries would have gone unpunished; and besides the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night, when all creation is at rest.] But the doctrines of the common law on this subject are no longer of practical importance, it being provided by 24 & 25 Vict. c. 96, (by which this offence is now regulated,) that for the purposes of that Act, and in reference to the crime now under consideration, the night shall be deemed to commence at nine in the evening, and to conclude at six in the morning of the succeeding day (*m*).

[As to the *place*. It must be, according to Sir E. Coke's definition, in a *mansion-house;* and therefore to account for the reason why breaking open a church by night is burglary, as it undoubtedly is, he quaintly observes, that it is *domus mansionalis Dei* (*n*). But it does not seem absolutely necessary that it should, in all cases, be a mansion-house; for burglary may also be committed by breaking the gates or walls of a *town* in the night; though that perhaps Sir Edward Coke would have called, the mansion-house of the garrison or corporation. Spelman defines burglary to be "*nocturna diruptio alicujus habitaculi, vel ecclesiæ, etiam murorum portarumve civitatis aut burgi, ad feloniam aliquam perpetrandam*" (*o*). And therefore we may safely conclude that the requisite of its being *domus mansionalis*, is only in

(*l*) 3 Inst. 63; 1 Hale, P. C. 550; Hawk. P. C. b. 1, c. 38, s. 2.

(*m*) 24 & 25 Vict. c. 96, s. 1. The previous enactment on this subject, contained in 7 Will. 4 & 1 Vict. c. 86, s. 4, was repealed by 24 & 25 Vict. c. 95.

(*n*) 3 Inst. 64.

(*o*) Spelm. Gloss. tit. "Burglary;" Hawk. P. C. b. 1, c. 38, s. 10.

[the burglary of a private house, which is the most frequent; and in which it is indispensably necessary, to form its guilt, that it must be in a mansion or dwelling-house; for no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle or defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi*, is the object of burglary, though no one be in it at the time of the fact committed (*p*).] And it was formerly the rule (*q*), that if the barn, stable, or warehouse, were parcel of the mansion-house, and within the same common fence (though not under the same roof, or contiguous,) a burglary might be committed therein; for the capital house protected and privileged all its branches and appurtenances, if within the curtilage or homestall. But it is now provided, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be a part of such dwelling-house for the purpose of burglary, unless there shall be a *communication* between such building and dwelling-house; either immediate, or by means of a covered and inclosed passage leading from one to the other (*r*). [A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is to all other purposes as well as this, the mansion-house of the owner (*s*). So also is a room or lodging in any private house the mansion for the time being of the lodger, if the owner doth not himself dwell in the house, or if he and his lodger enter by different outward doors (*t*); but if the owner himself

(*p*) 1 Hale, P. C. 556; Fost. 77.

(*q*) R. *v.* Garland, 1 Leach, C. L. 171.

(*r*) 24 & 25 Vict. c. 96, s. 53; re-enacting 7 & 8 Geo. 4, c. 29, s. 13, which was repealed by 24 & 25 Vict. c. 95.

(*s*) 1 Hale, P. C. 556; Hawk. P. C. b. 1, c. 38, s. 13.

(*t*) See R. *v.* Rogers, 1 Leach, C. C. 89; R. *v.* Trapshaw, ib. 427.

[lies in the house, and hath but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates; and all their apartments to be parcel of the one dwelling-house of the owner (*u*). Thus, too, the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers (*x*). But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling-house, nor can burglary be committed therein; for by the lease it is severed from the rest of the house, and therefore it is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein, when I never lie there (*y*). Neither can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein (*z*); for the law regards thus highly nothing but permanent edifices—a house or church, the wall or gate of a town: and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon under the same circumstances.

As to the *manner* of committing burglary, there must be both a breaking and an entry to complete it: but they need not be both done at once (*a*); for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars (*b*). There must in general be an actual breaking,—not a mere legal *clausum fregit*, by leaping over invisible, ideal boundaries, such as may constitute a civil trespass, but a substantial and forcible irruption,—as at least by breaking, or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the

(*u*) Kel. 84; 1 Hale, P. C. 556.
(*x*) Fost. 38, 39; 2 East, P. C. c. 15, s. 14.
(*y*) 1 Hale, P. C. 558.
(*z*) Hawk. P. C. b. 1, c. 38, s. 17.
(*a*) R. *v.* Bird, 9 Car. & P. 44; R. *v.* Smith, R. & R. C. C. 417.
(*b*) 1 Hale, P. C. 551.

[latch of a door, or unloosing any other fastening which the owner hath provided. But if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary; yet if he afterwards unlocks an inner or chamber door, it is so (*c*). But to come down a chimney is held a burglarious entry, for that is so much closed as the nature of things will admit. So also to knock at a door, and upon opening it to rush in with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house: all these entries have been adjudged burglarious, though there was no actual breaking: for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process (*d*). And so if a servant opens and enters his master's chamber door, with a felonious design; or if any other person lodging in the same house, or in a public inn, opens and enters another's door with such evil intent; it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both (*e*); for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it with any part of the body, or with an instrument held in the hand, is sufficient: as, to step over the threshold, to put a hand or hook in at the window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries (*f*).] The entry may be

(*c*) 1 Hale, P. C. 553.

(*d*) Hawk. P. C. b. 1, c. 38, s. 5.

(*e*) Cornwall's case, Stra. 881; Hale, ubi sup.

(*f*) 1 Hale, P. C. 555; Hawk. P. C. b. 1, c. 38, s. 7; Fost. 108. As to what entries *are* burglarious, see the following cases: R. *v.* Bailey, R. & R. C. C. 341; R. *v.* Russell, 1 M. C. C. R. 377; R. *v.* Davis, R. & R. C. C. 355; R. *v.* Brice, ib. 450; R. *v.* Haines, ib. 451. And as to what are *not*, see R. *v.* Lawrence, 4 Car. & P. 231; R. *v.* Smith, R. & M. C. C. R. 178; R. *v.*

before the breaking as well as after; for though there were once different opinions upon the question as to whether the breaking *out* of a house to escape, by a man who had previously entered by an open door with intent to steal, was burglary, Lord Bacon (*g*) holding the affirmative and Sir Matthew Hale (*h*) the negative, it is now enacted that whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary (*i*). But it is universally agreed that there must be both a breaking, either in fact or by implication, and also an entry,—in order to complete the burglary (*j*).

As to the *intent*. It is clear that, except where the commission of a felony in the dwelling-house is connected with the crime in a different manner, as in the instance above given, such breaking and entry must be with a felonious intent, otherwise it is only a trespass (*k*). [And it is the same whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law or only created so by statute,—since that statute which makes an offence felony, gives it incidentally all the properties of a felony at common law.]

Rust, Ryan & Moody, C. C. R. 183.

(*g*) Bac. Elem. 65; and see 2 East, P. C. c. 15, s. 6.

(*h*) 1 Hale, P. C. 554.

(*i*) 24 & 25 Vict. c. 96, s. 51. A similar enactment was formerly contained in 12 Ann. c. 7 (repealed by 7 & 8 Geo. 4, c. 27), and afterwards in 7 & 8 Geo. 4, c. 29 (repealed by 24 & 25 Vict. c. 95).

(*j*) 4 Bl. Com. 227.

(*k*) 1 Hale, P. C. 561.

Thus much for the nature of burglary, and until recently it was, under certain circumstances of aggravation, a capital offence (*l*); for by 7 Will. IV. & 1 Vict. c. 86, burglariously to break and enter into any dwelling-house, and to assault with intent to murder—or even without such intent to stab, cut, wound, beat, or strike—any person being therein, was a felony, punishable with death. But this Act was repealed by 24 & 25 Vict. c. 95; and under 24 & 25 Vict. c. 96, s. 52, whoever shall be convicted of the crime of burglary, shall be liable to penal servitude for life, or any term not less than five years (*m*); or to be imprisoned for any term not more than two years; and, in the case of imprisonment, hard labour and solitary confinement may be superadded.

In connection with the crime of burglary it may be mentioned, that whoever shall *in any way* enter a dwelling-house in the night, with intent to commit a felony, is guilty of felony, and punishable with penal servitude to the extent of seven years, or imprisonment as above specified (*n*). And that whoever shall be found by night, armed with a dangerous or offensive weapon or instrument, *with intent* to break or enter any building, and to commit felony therein; or shall even be found by night in the possession, without lawful excuse, of any house-breaking implement; or with his face blackened or disguised, with intent to commit any felony; or shall be found by night in any building, with intent to commit a felony therein:—shall be guilty of a *misdemeanor*, punishable with penal servitude for five years, or imprisonment (with or without hard labour) not exceeding two years (*o*): and, in case of a second conviction, or if convicted after a previous con-

(*l*) At common law burglary was a clergyable felony, but the clergy was taken away by 1 Edw. 6, c. 12; 18 Eliz. c. 7; and 3 & 4 W. & M. c. 9. These Acts were repealed by 7 & 8 Geo. 4, c. 27, and the punishment was death under 7 & 8 Geo. 4, c. 29, until the passing of 7 Will. 4 & 1 Vict. c. 86.

(*m*) See 27 & 28 Vict. c. 47.

(*n*) 24 & 25 Vict. c. 96, s. 54.

(*o*) See 27 & 28 Vict. c. 47.

viction for felony, he is liable either to such imprisonment, or to penal servitude to the extent of ten years (*p*).

III. *Sacrilege* and *housebreaking by day* are both offences which are now regulated by 24 & 25 Vict. c. 96; and, with regard to the first, it is provided, that the same penal consequences as are provided by that Act with respect to *burglary*, and which we have already specified (*q*), shall attach to whomsoever shall break and enter any church, chapel, meeting-house, or other place of divine worship, and commit a felony therein,—or, being in such place, shall commit a felony therein, and then break out of the same (*r*). This constitutes the crime of sacrilege, and is breaking into the House of God. It is consequently made more penal than to break by day into other buildings; for in housebreaking by day (*s*) the extreme limit of the term of penal servitude which may be inflicted is fourteen years, instead of for life (*t*).

It is also a felony, and punishable either by imprisonment as in the previous cases, or by penal servitude to the extent of seven years, to break and enter any dwelling-house, church, chapel, meeting-house or other place of divine worship, or any building within the curtilage, or

(*p*) 24 & 25 Vict. c. 96, ss. 58, 59, re-enacting 14 & 15 Vict. c. 19, ss. 1 and 2. As to the construction of which, see R. *v.* Oldham, 21 L. J. (M. C.) 134; R. *v.* Bailey, 1 Dearsley's C. C. R. 249. By stat. 5 Geo. 4, c. 33, s. 4, it is also provided, that persons in possession of housebreaking implements with intent to break into a house, shall be deemed *rogues and vagabonds*, and punished accordingly.

(*q*) Vide sup. p. 114.

(*r*) 24 & 25 Vict. c. 96, ss. 50, 52.

(*s*) House-breaking is where the offender, after breaking and entering into or out of any dwelling-house, school-house, shop, warehouse or counting-house, or into or out of any building within the curtilage of a dwelling-house and occupied therewith, but not being part thereof, commits any felony therein; but no building, although within the curtilage of a dwelling-house and occupied therewith, is to be deemed part thereof unless there be a communication either immediate or by means of a covered and enclosed passage (24 & 25 Vict. c. 96, s. 53).

(*t*) Sects. 55, 56.

any school-house, shop, warehouse or counting-house, *with intent* to commit any felony therein, although such felony shall not have been effected (*u*).

Having now considered offences more immediately connected with houses and other buildings, we proceed, in the second place, to consider offences against property in general, including offences against rights arising out of contract.

1. *Larceny* (by contraction for latrociny, *latrocinium*), is the unlawful taking and carrying away of things personal, with intent to deprive the right owner of the same (*x*); and it is either simple or accompanied with circumstances of aggravation (*y*). Let us examine into the nature of this offence (which is otherwise termed *theft*), as laid down in this definition.

In the first place it must be an *unlawful taking*, which implies that the goods must pass from the possession of the right owner (*z*), and without his consent (*a*) : and therefore

(*u*) 24 & 25 Vict. c. 96, s. 57; 27 & 28 Vict. c. 47. See The Queen *v.* McPherson, 26 L. J. (N. S.) M. C. 134. By 14 & 15 Vict. c. 100, s. 9, a verdict of guilty of an attempt to commit felony, may be given on an indictment charging the actual commission of a felony.

(*x*) The definition of Blackstone (vol. iv. p. 229) is "the felonious "taking and carrying away of the "personal goods of another." But this leaves it to be inquired, what *kind* of taking and carrying away is considered as felonious.

(*y*) Larceny, accompanied with circumstances of aggravation, is described in the books as being *compound*, *mixed* or *complicated*, as to which, vide post, p. 127.

(*z*) 1 Hale, P. C. 513. As to this part of the definition see the Report of the Criminal Code Bill Commission, p. 27. It is there stated that this rule has given rise to "vast technicality"—inasmuch as there are many cases on the primary point as to what is the precise meaning of taking or carrying away, considered as a physical operation.

(*a*) 4 Bl. Com. 230. Upon the ground that in contemplation of law husband and wife are one person, the latter cannot be convicted of stealing her husband's goods. (See as to this The Queen *v.* Kenny, Law Rep., 2 Q. B. D. 307, and the observations contained in the Report above referred to, p. 28.)

where there is no change of possession, or a change of it by consent, or a change from the possession of a person without title to that of the right owner, there can be no larceny (*b*). And, as the taking must be without the consent of the owner, so, as the general rule, no delivery of the goods from the owner to the offender upon trust, can ground a larceny :—as if A. lends B. a horse, and he rides away with him (*c*). Yet if the delivery be obtained from the owner by a person having *animus furandi* at the time, and who afterwards unlawfully appropriates the goods in pursuance of that intent, it is larceny; as if, in the case above supposed, B. solicited the loan of the horse, with intent to steal him (*d*). But in such cases, the bare failure to re-deliver to the owner shall not of necessity be intended to arise from a felonious design; since that may happen from a variety of other accidents. On the other hand, one who has received goods by delivery from the owner, under such circumstances as fail to divest such owner of the legal possession, will be guilty of larceny if he appropriates them to himself (*e*); as when a servant makes away with his master's plate (*f*), or the guest at an inn makes away with the articles of which he has the temporary use (*g*). And, moreover, the principle of the common law as to the necessity of the owner not consenting to the original taking, in order to support a charge of larceny, has been, in some instances, qualified by special enactments of the legislature. Thus, whoever shall steal any chattel or fixture let to be used by him in any house or lodging, shall be guilty of felony, and may be punished (if the value of what is stolen shall exceed five pounds) by penal servitude for seven years or

(*b*) But if a person has temporary title against the permanent owner, the latter may be guilty of larceny in taking them. (R. *v.* Wilkinson, R. & R. C. C. 470; 4 Bl. Com. 231.)

(*c*) 4 Bl. Com. 230.

(*d*) Major Semple's case, 2 Leach, 469, 470. See Queen *v.* Poyser, 20 L. J. (M. C.) 191.

(*e*) Reed's case, 2 Dearsley's C. C. R. 168, 257.

(*f*) Christian's Blackstone, vol. iv. p. 230 (note); 1 Hale, P. C. 506.

(*g*) Hawk. P. C. b. 1, c. 33, s. 6; 4 Bl. Com. 231.

imprisonment for two (*k*). And it has also been provided that the bailee of any chattel, money or valuable security, who shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, shall be guilty of larceny,—and this although he shall not break bulk or otherwise determine the bailment; which, at common law, was a condition precedent to the commission of larceny by a bailee (*l*).

[Again, there must not only be a taking but a *carrying away*. *Cepit et asportavit* was the old law Latin. But a bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation.] Thus it is larceny, if a man leading another's horse out of a close, be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his bed-chamber to a room downstairs (*m*); or, if a thief, intending to steal plate, takes it out of a chest and lays it down upon the floor, but is surprised before he can make his escape with his spoil (*n*).

[Further, the taking and carrying away must be of *personal goods*. Lands, tenements and hereditaments, either corporeal or incorporeal, cannot in their nature be taken and carried away. And in respect of things that adhere to the freehold,—as corn, grass, trees and the like, no larceny could be committed by the rules of the common law, but the severance of them was merely a trespass; which depended on a subtlety in the legal notions of our ancestors. For such things were parcel of the real estate: and therefore, while they continued so, could not by any

(*k*) 24 & 25 Vict. c. 96, s. 74. If the value be less than 5*l*. the punishment is *imprisonment* only, to the extent of two years. In either case, to the punishment of imprisonment, hard labour with solitary confinement and whipping (if the offender be a male under the age of sixteen) may be added.

(*l*) See 24 & 25 Vict. c. 96, s. 3, re-enacting 20 & 21 Vict. c. 54, s. 4, which was repealed by 24 & 25 Vict. c. 95. As to the punishment of larceny in general, vide post, p. 124.

(*m*) 3 Inst. 108, 109.

(*n*) As to the application of this doctrine, see White's case, 1 Dearsley's C. C. R. 203.

[possibility be the subject of theft, being absolutely fixed and immoveable. And even if they were severed from the freehold, so as to be changed into moveables, and at the same time, by one and the same continued act, carried off by the person who severed them; they could never be said to be taken from the *proprietor* in this their newly-acquired state of mobility, (which is essential to the nature of larceny,) being never, as such, in the actual or constructive possession of any one but him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another; since the very act of taking, was what turned them into personal goods. But if the thief severed them at *one* time (whereby the trespass was completed and they were converted into personal chattels in the constructive possession of him on whose soil they were left or laid) and he came again at *another* time, after they had been so turned into personalty, and took them away, it was larceny at the common law; and so it was, if the owner, or any one else, severed them and they were afterwards removed by the thief (*o*). So, upon nearly the same principle, the stealing of writings relating to real estate was at common law no felony, but a trespass (*p*); because they concerned the land,—or, according to our technical language, *savour of the realty*,—and are considered as part of it by the law: so that they come to the heir or devisee together with the land to which they refer (*q*). On other grounds, bonds, bills and notes, (which concern mere *choses in action*,) were also, at the common law, held not to be such goods whereof larceny might be committed; being of no intrinsic value, and not importing any property in *possession* of the person

(*o*) 3 Inst. 109; 1 Hale, P. C. 510.

(*p*) Hale, ubi sup.; R. *v.* Westbeer, Stra. 1137. The Report of the Criminal Code Bill Commission states this rule to be wholly indefensible, while it occasionally produces failure of justice where the statutory exception to it is not quite so extensive with the common law rule (p. 27).

(*q*) Vide sup. vol. I. p. 279, et vol. II. p. 220.

[from whom they are taken (*r*). By the common law, also, larceny could not be committed of treasure trove, or wreck, till seized by the Crown or him who had the franchise; for till such seizure, no one hath a determinate property therein: nor could it be committed, at the common law, of animals wherein there is no property either absolute or qualified; as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares and conies in a forest, chase or warren; fish in an open river or pond; or wild fowls at their natural liberty (*s*). But if such animals are reclaimed or confined, and may serve for food, it is otherwise; for of deer so inclosed in a park that they may be taken at pleasure, of fish in a trunk, and of pheasants or partridges in a mew, larceny, at common law, may be committed (*t*). It is also said that if swans be lawfully marked, it is felony at common law to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a trespass (*u*). But of all valuable domestic animals, as horses and other beasts of draught; and of all animals *domitæ naturæ*, which serve for food, as cattle, swine, poultry and the like; and of their fruit or produce taken from them while living, as milk or wool (*v*),—larceny may be committed at common law; as it may also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed (*x*). While, on the other hand, as to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value,—as dogs of all sorts, and other creatures

(*r*) 8 Rep. 33 b. See Reg. *v.* Watts, 1 Dearsley's C. C. R. 326.

(*s*) 1 Hale, P. C. 511; Fost. 366.

(*t*) Hawk. P. C. b. 1, c. 33, s. 25; Hale, ubi sup. And see Report of the Criminal Code Bill Commission, p. 27, as to the result of legislation in these matters, particularly with regard to *pigeons;* as to which see also The Queen *v.* Cheafor, 24 L. J. (M. C.) 43; and Taylor *v.* Newman, 4 B. & S. 89.

(*u*) Dalt. Just. c. 158.

(*v*) Dalt. 21; Crompt. 36; Hawk. P. C. b. 1, c. 33, s. 28; Hale, ubi sup.; The King *v.* Martin, (by all the judges,) P. 17 Geo. 3.

(*x*) Hale, ubi sup.

[kept for whim and pleasure,—though a man might have a bare property therein, and maintain a civil action for the loss of them (*y*); yet they are not of such estimation as that the crime of stealing them amounts to the common law offence of larceny (*z*).

Lastly, the carrying away must be *with intent to deprive the right owner* of that which is taken; or, as it is frequently expressed, the carrying away must be *animo furandi* (*a*). This requisite, besides excusing those who labour under incapacities of mind or will, of whom we spoke sufficiently at the entrance of this Book, indemnifies also mere trespassers and other petty offenders (*b*). As if a servant takes his master's horse without his knowledge, and brings him home again,—if a neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it,—if, under colour of being owner of rent where none is due, I distrain another's cattle or seize them,—all these are trespasses, but no felonies (*c*).

(*y*) 1 Hale, P. C. 512.

(*z*) 1 Hale, ubi sup. It must be borne in mind, that the above observations relate only to the doctrines as to larceny, which prevailed *at common law*. But by modern statutes, the stealing of many things which were at common law not the subject of larceny, is now made highly penal, as is further explained post, p. 126. And it may be added here, that the Commissioners of the Criminal Code Bill, in reference to the distinctions adverted to in the text as to stealing animals *feræ naturæ*, or things attached to or savouring of the realty, observe that they are very subtle, and many of them arbitrary; and they proceed to describe the existing state of the law on these matters as follows: "The "things which are capable of being "stolen, according to the common "use of the word, but which are "not, at common law, the subjects "of larceny, may be described as, "first, certain animals; secondly, "documents evidencing certain "rights; and thirdly, lands and "things fixed to or growing out "of it" (p. 26).

(*a*) See The Queen *v.* Middleton, Law Rep., 2 C. C. R. 38. We may here notice a statute (31 & 32 Vict. c. 116), by which *one* of two or more beneficial owners of property or members of a partnership who shall steal or embezzle any joint property, may be tried and punished, as if he was not one of such beneficial owners or member of the copartnership.

(*b*) Vide sup. p. 21.

(*c*) 1 Hale, P. C. 509.

[The ordinary discovery of a felonious intent, is where the party doth it clandestinely; or being charged with the fact, denies it. But this is by no means the only criterion of criminality: for in cases that may amount to larceny, the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent or *animus furandi;* wherefore they must be left to the due and attentive consideration of the court and jury (*d*).] It may be here observed, that it was at one time by law a felony for a servant, contrary to orders, to take his master's corn or other food even for the purpose of feeding the horses or other animals of such master, though in many of such cases (particularly where the food was in the control of the servant) no *animus furandi* could be established; and it was consequently difficult to obtain a conviction for this offence. But by 26 & 27 Vict. c. 103, this species of misconduct has been expressly removed from the rank of a felony, and has been made punishable by way of imprisonment or pecuniary penalty after summary conviction.

[The crime of larceny may be committed as to a thing whereof the owner is *unknown*, provided it appear that there is an owner other than the taker (*e*). In like manner, as among the Romans, the *lex Hostilia de furtis* provided that an action for theft might, in certain cases, be carried on without the intervention of the owner (*f*). An example of this may occur in the case of stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpse itself, though a matter of great indecency (and, if

(*d*) As to the application of the doctrines referred to in the text, to a fraudulent sale to the owner of his own property, see R. *v.* Hall, 1 Den. C. C. 381; Manning's case, 1 Dears. C. C. R. 21; and as to property larcenously appropriated by the *finder* thereof, see R. *v.* Christopher, 28 L. J. (M. C.) 35.

(*e*) See 1 Hale, P. C. 512; 2 Hale, P. C. 290.

(*f*) Gravin. l. 8, c. 106.

[the corpse be disinterred for the purpose, an indictable misdemeanor), is said to be no felony, unless some of the grave-clothes be stolen with it (*g*).

Having thus considered the general nature of larceny, we now arrive at its punishment, which (as we shall see) differs according to whether it is simple larceny or is attended with circumstances of aggravation. Theft, by the Jewish law, was only punished with a pecuniary fine and satisfaction to the party injured (*h*). The laws of Draco, at Athens, punished it with death: but his laws were said to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. The civil law only obliged the *fur* or common thief to restore the thing stolen and pay in addition a fine to the owner, though in some very late constitutions we find the punishment capital. In this country our antient Saxon laws nominally punished theft with death, if above the value of twelve pence; but the criminal was permitted to redeem his life by a pecuniary ransom; as, amongst their ancestors the Germans, by a stated number of cattle (*i*).] But in the ninth year of Henry the first, this power of redemption was taken away; and all persons guilty of larceny, above the value of twelve pence, were directed to be hung (*k*). So that

(*g*) 4 Bl. Com. 235. Blackstone adds, that by the law of the Franks, a person who dug a corpse up, in order to strip it, was to be banished from society; and no one suffered to relieve his wants till the relatives of the deceased consented to his re-admission; and he cites Montesq. Sp. L. b. 30, c. 29.

(*h*) Exod. xxii.

(*i*) Tac. de Mor. Germ. c. 12.

(*k*) This sum (says Blackstone, vol. iv. p. 237) was the standard in the time of King Athelstan; and he observes that afterwards, in the reign of King Henry the first, one shilling was the stated value, at the Exchequer, of a pasture fed ox (Dial. de Scacc. l. 1, s. 7); and that if we should suppose this shilling to mean that *solidus legalis* mentioned by Lyndewoode (Prov. l. 3, c. 13), or the 72nd part of a pound of gold, it would be equal to 13*s.* 4*d.* of the present standard. It may be observed that the progressive reduction in the value of money, while death continued to be the sentence for theft to the same amount as before, justified the complaint of Sir H. Spelman (Gloss. 350), that while everything else living became dearer, the life of man had continually grown cheaper.

stealing to above this value, (which was called *grand larceny*,) became then a capital felony and continued such down to our own times, wherever (as was very frequently the case) the *benefit of clergy* was taken away by some express statute from the particular species of theft of which an offender was convicted; though if not so taken away, then, by the law relating to benefit of clergy, as latterly modified, the pains of death were in fact excused, provided it were the first offence (*l*). On the other hand, petty larceny, that is, theft *under* the value of twelve pence, was never capital, but a felony punished with imprisonment or whipping only (*m*). At the present day, however, there is no distinction recognized by the law, between grand and petty larceny, though that between simple and aggravated larceny still remains (*n*). And by the provisions now in force the punishment for simple larceny, or of any felony made punishable like simple larceny, is (as the general rule) penal servitude for *five* years (*o*), or imprisonment not exceeding two years, with or without hard labour, solitary confinement, and (in the case of a male under sixteen years) whipping (*p*); but in certain cases (*q*),—or after a conviction for an indictable misdemeanor, punishable under 24 & 25 Vict. c. 96 (*r*),—the term of penal servitude may extend to *seven* years (*s*); and in case of a conviction after a previous conviction for felony (either on indictment or by way of summary conviction), may be as long as *ten*

(*l*) It is stated in the Report of the Criminal Code Bill Commission (p. 28), that grand larceny was a capital but clergyable felony down to the reign of Geo. IV.

(*m*) 3 Inst. 218; Hawk. b. 1, c. 33. s. 36; 4 Bl. Com. 237.

(*n*) The Report just mentioned, states that the Commissioners are of opinion that the legal limit of punishment ought not to depend on the mere value of the property stolen (p. 28).

(*o*) See 27 & 28 Vict. c. 47.

(*p*) 24 & 25 Vict. c. 96, s. 4. But in certain cases, the offence of simple larceny may be summarily disposed of before justices at petty sessions, (or before a metropolitan or stipendiary magistrate.) Vide post, chapter on Summary Convictions.

(*q*) Vide post, chapter on Summary Convictions.

(*r*) See 24 & 25 Vict. c. 96, s. 8.

(*s*) Sect. 9.

years (*t*). In certain cases, moreover, where the larceny relates to a subject for which the policy of the law provides with more anxiety, the punishment may be even more severe. For if any person shall steal, (to the value of ten shillings,) any woollen, linen, hempen or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca or mohair; or any one or more of those materials mixed with each other, or mixed with any other material;—whilst laid, placed, or exposed, during any stage, process or progress of manufacture, in any building, field or other place,—the term of penal servitude which may at the discretion of the court be given instead of mere imprisonment, is extended to *fourteen* years (*u*). So, also, whoever shall steal a horse, mare, gelding, colt or filly; a bull, cow, ox, heifer or calf; or a ram, ewe, sheep or lamb; is punishable by penal servitude to the extent of *fourteen*, or not less than five years, or by imprisonment, with or without hard labour and solitary confinement, to the extent of two years (*x*).

[The additional severity sanctioned in these instances, is owing to the difficulty there would otherwise be in preserving goods so easily carried off (*y*). Upon which principle the Roman law punished more severely than other thieves the *abigei*, or stealers of cattle (*z*); and the *balnearii*, or such as stole the clothes of persons who were washing in the public baths (*a*): both which constitutions seem to be borrowed from the laws of Athens (*b*). And so, too, the antient Goths punished, with unrelenting

(*t*) 24 & 25 Vict. c. 96, s. 7.

(*u*) Sect. 62, re-enacting in substance 7 & 8 Geo. 4, c. 29, s. 16.

(*x*) 24 & 25 Vict. c. 96, s. 10; 27 & 28 Vict. c. 47. See also 24 & 25 Vict. c. 96, s. 11, as to wilfully killing *any* animal (the stealing whereof would have amounted to felony), *with intent to steal* the carcase, &c.; sects. 12—16, as to unlawfully carrying away, &c. *deer* kept in forests, &c.; sect. 17, as to unlawful taking of *rabbits;* sect. 23, of *pigeons;* and sects. 24, 25, of *fish*.

(*y*) Vide sup. p. 18.

(*z*) Ff. 17, t. 4.

(*a*) Ib. t. 17.

(*b*) Pott. Antiq. b. 1, c. 26.

[severity, thefts of cattle, or corn that was reaped and left on the field; such kind of property, which no human industry can sufficiently guard, being esteemed under the peculiar custody of Heaven (*c*).]

The offence which we have been hitherto considering is that of larceny *at common law*, but in connection with this offence, and proper for consideration under the same head, is the crime of *stealing things* not *the subject of larceny at common law*. For in progress of time it was found necessary to extend the protection of the penal laws to many of those subjects, of which the antient law of larceny took no account: and Acts of Parliament were accordingly passed, from time to time, by which punishments were imposed for thefts committed in respect of various kinds of property so circumstanced: and though these statutes have been repealed, the same general object has been pursued in the existing Act (24 & 25 Vict. c. 96), which was passed in the year 1861, to consolidate the statute law "relating to larceny and other similar offences" (*d*). By this Act (*e*) provisions are made against stealing "valuable securities,"—such as bonds, bills and the like (*f*)—and numerous other subjects of property of which the enumeration will be found in a note below (*g*); and it may be laid down in

(*c*) Stiern. de Jure Goth. l. 3, c. 5.

(*d*) Some of the provisions of this Act are also pointed at the fraudulent or improper *destruction* of the subjects of property; and (in the case of animals) against the killing *with intent* to steal them.

(*e*) This statute is to a certain extent based on a previous Act, having the same general design, and nearly the same title, viz., the 7 & 8 Geo. 4, c. 29, which (so far as the united kingdom is concerned) was repealed by the 24 & 25 Vict. c. 95.

(*f*) 24 & 25 Vict. c. 96, ss. 1, 27. See R. *v.* Smith, 1 Dearsley's C. C. R. 561.

(*g*) See 24 & 25 Vict. c. 96, ss. 18—20, as to *dogs;* ss. 21, 22, as to *birds and animals ordinarily kept in confinement;* s. 26, as to *oysters;* s. 27, as to *valuable securities not being part of title to lands;* s. 28, as to *documents of title to lands;* s. 29, as to *wills;* s. 30, as to *records and legal documents;* s. 31, as to *fixtures;* ss. 32, 33, as to *trees;* ss. 34, 35, as to *fences;* s. 36, as to *fruit;* s. 37, as to *garden produce;* ss. 38, 39, as to *ores*. A variety of antecedent statutes, passed with the same ob-

general terms, that stealing has now become an offence, liable to punishment or penalty, in regard to all moveables whatever. We may also remark, with respect to the kinds of stealing thus created by statute in supplement to the antient law of larceny, that all the common law doctrines relative to larceny, which we have already had occasion to notice, are in general applicable to thefts of this description also (*h*), though they are not technically denominated *larcenies* (*i*); and that their punishment is, in many cases, identical. In several instances, however, they do not amount, like larceny at common law, to a felony, but to a misdemeanor only; and there are others of them not assignable to the class either of felony or misdemeanor; but restrained by fixed pecuniary penalties only, recoverable, in a summary way, before a justice of the peace (*k*).

We have seen that larceny may not only be simple, but combined with circumstances of aggravation; which is described in our books as mixed, compound, or complicated larceny (*l*); and this is not only, like simple larceny, felonious, but is felony of a more penal character. We will therefore now consider,

1. Larceny committed *in a dwelling-house.* [This species of theft, though it seems to have a higher degree of guilt than simple larceny, yet was not at all distinguished therefrom at common law (*m*); unless where it was accompanied with the circumstance of breaking the house by night, and then it fell under another description of crime, viz., that of burglary. But afterwards, by several Acts of Parliament,—the history of which is very ingeniously deduced

ject of supplying the defects of the antient law in this particular and noticed by Blackstone, (vol. iv. p. 233, &c.,) were repealed by 7 & 8 Geo. 4, c. 27.

(*h*) R. v. St. John, 7 C. & P. 324.

(*i*) See R. v. Gooch, 8 C. & P. 293.

(*k*) Vide post, chapter on Summary Convictions.

(*l*) 4 Bl. Com. 239; Hawk. P. C. b. 1, cc. 33, 34.

(*m*) Hawk. P. C. b. 1, c. 36.

[by a learned writer, who hath shown them to have gradually arisen from our improvements in trade and opulence, —the benefit of clergy was taken, in almost every instance, from larcenies when committed in a house (*n*); so that the capital sentence, to which they were at that period of our law subject as larcenies, took effect (*o*).] These Acts, however, are all repealed, and this crime is now regulated by 24 & 25 Vict. c. 96, ss. 60, 61 (*p*). By the first of these provisions, whoever shall steal *in any dwelling-house*, any chattel, money, or valuable security to the value of five pounds or more, shall be liable to penal servitude for fourteen years, or not less than five years (*q*); or to be imprisoned, with or without hard labour and solitary confinement, not exceeding two years; and by the second, the same punishment is awarded to whomsoever shall steal in a dwelling-house any chattel, money or valuable security, and shall by menace or threat *put any one, being therein, in bodily fear.*

2. Larcenies *in ships, wharfs, &c.* Whoever shall steal goods or merchandise in a vessel, barge or boat in any haven or port of entry or discharge, or upon a navigable river or canal, or in a creek or basin belonging to or communicating with such haven, port, river, or canal;—or who shall steal any goods or merchandize from a dock, wharf, or quay adjacent to such haven, port, river, canal, creek, or basin;—is liable to the same punishments as last mentioned (*r*). And the same punishments may also be awarded to whomsoever shall plunder or steal any part of a ship or vessel in distress, or wrecked or stranded, or cast on shore; or goods, merchandize, or articles of any kind to her belonging (*s*).

(*n*) See Barrington on Statutes, 375, &c.

(*o*) Vide sup. p. 124.

(*p*) The previous provisions on this head, contained in 7 & 8 Geo. 4, c. 29, s. 12, and 7 Will. 4 & 1 Vict. c. 86, s. 5, was repealed by 24 & 25 Vict. c. 95.

(*q*) See 27 & 28 Vict. c. 47.

(*r*) 24 & 25 Vict. c. 96, s. 63.

(*s*) Sect. 65.

3. [Larceny *from the person* (*t*): which is either by *privately stealing;* or by open and violent assault, usually called *robbery.* The offence of *privately stealing from a man's person*,—as by picking his pocket or the like, privily without his knowledge,—was debarred of the benefit of clergy so early as by the statute of 8 Eliz. c. 4 (*u*): a severity which seems to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the Queen's court and presence) at the time when this statute was made: besides, that this was an infringement of property in the manual occupation or corporal possession of the owner; and hence, too, the *saccularii*, or cut purses, were more severely punished than common thieves both by the Roman and Athenian laws (*v*).] But this statute of Elizabeth was repealed by 7 & 8 Geo. IV. c. 27; and new provisions are now in force as to the punishment of this offence (which is no longer capital), of which we shall presently have occasion to speak more at large (*x*).

[Open and violent larceny from the person, or robbery, the *rapine* of the civilians, is the unlawful and forcible taking from the person of another, of goods or money to any value, by violence or putting him in fear (*y*). 1. There must be an unlawful taking, otherwise it is no robbery (*z*). On the other hand, if the thief, having once

(*t*) In certain cases, larceny from the person may be disposed of summarily by justices at petty sessions, (or before a metropolitan or stipendiary magistrate.) Vide post, chapter on Summary Convictions.

(*u*) This, however, was only where the thing stolen was of the value of more than twelve pence, for if it was below that value, so as to reduce the offence to petty larceny (as to which, vide sup. p. 124), there was no need of the benefit of clergy—the sentence not being capital. (Hawk. P. C. b. 1, c. 35, s. 4.)

(*v*) Ff. 47, 11, 7; Pott. Antiq. l. 1, c. 26.

(*x*) Vide post, p. 131.

(*y*) Hawk. P. C. b. 1, c. 34, s. 2.

(*z*) A mere *attempt* to rob was held to be felony, so late as Henry the fourth's time; (1 Hale, P. C. 532;) but afterwards it was taken to be only a misdemeanor, until 7 Geo. 2, c. 21; which made it a

[taken a purse, return it to the owner, still it is a robbery (*a*); and so it is, whether the taking be strictly from the person of another, or in his presence only; as where a robber, by menaces and violence, puts a man in fear, and drives away his sheep or his cattle before his face (*b*). But if the taking be not either directly from his person or in his presence, it is no robbery (*c*). 2. It is immaterial of what value the thing is: a penny as well as a pound, thus forcibly extorted, makes the robbery (*d*). 3. Lastly, the taking must be by force, or a previous putting in fear, for it is this which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law, *qui vi rapuit, fur improbior esse videtur* (*e*). This previous violence or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one privately steals a chattel from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent (*f*). Not that it is indeed necessary to lay in the indictment, that the robbery was committed by *putting in fear;* it is sufficient if laid to be done by *violence* (*g*). And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force or threatening, by word or gesture, be used as might create an apprehension of danger; or induce a man to part with his property without or against his consent (*h*). Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to

felony. This statute was repealed by 4 Geo. 4, c. 54, itself repealed by 7 & 8 Geo. 4, c. 27. As to the present law with regard to assaults with intent to rob, under 24 & 25 Vict. c. 96, s. 40 et seq., vide post, p. 132.

(*a*) R. *v.* Peat, 1 Leach, C. C. 228.

(*b*) 1 Hale, P. C. 533.

(*c*) Comyns, 478; R. *v.* Francis, Str. 1015.

(*d*) Hawk. P. C. b. 1, c. 34, s. 16.

(*e*) Ff. 47, 2, 4, xxii.

(*f*) 1 Hale, P. C. 534.

(*g*) Trin. T. 3 Ann. so held by all the judges.

(*h*) Fost. 128.

[be *put in fear*, yet this is undoubtedly a robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence; this also falls within the definition of the same crime (*i*). So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it has been doubted whether the forcing a higgler or other chapman to sell his wares, and giving him the full value for them, amounts to so heinous a crime as robbery (*k*). This species of larceny was debarred of the benefit of clergy by stat. 23 Hen. VIII. c. 1, and other subsequent statutes; not indeed in general, but only when committed in a dwelling-house, or in or near the king's highway. A robbery, therefore, in a distant field, was not punished with death (*l*); but was open to the benefit of clergy till the statute 3 & 4 W. & M. c. 9; which took away clergy from both principals and accessories before the fact in robbery, wheresoever committed.]

But the statutes above referred to,—as well as the 8 Eliz. c. 4, with respect to privately stealing from the person,—were repealed by 7 & 8 Geo. IV. c. 27. And, by later enactments, new provisions have been made against both species of offences (*m*); with distinctions, as regards robbery, suitable to the aggravations with which that crime may have been committed. According to these (which are contained in 24 & 25 Vict. c. 96), whoever shall rob any person, or shall steal any chattel, money or valuable security from his person, shall be guilty of felony, and may be sentenced to penal servitude for fourteen years or not less than five years, or to imprisonment, with or without hard labour and solitary confinement, not exceeding two years (*n*). And if the robbery be not effected or

(*i*) Hawk. P. C. b. 1, c. 34, s. 8.
(*k*) Ib. s. 14.
(*l*) 1 Hale, P. C. 535.
(*m*) The provisions referred to in the text were, however, preceded by others on the same subject, contained in 7 Will. 4 & 1 Vict. c. 87 and 14 & 15 Vict. c. 100, which were repealed by 24 & 25 Vict. c. 95.
(*n*) 24 & 25 Vict. c. 96, s. 40; 27 & 28 Vict. c. 47.

proved, but the offender be convicted (as he may be on an indictment for robbery) of an *assault with intent to rob*, then such assault is also felony, and imprisonment to the same extent as last mentioned may be awarded; though, if the punishment be by way of penal servitude, the term in such case is limited to five years (*o*). In certain instances, however, either robbery or an assault with intent to rob, is more severely punishable; for whoever shall rob, or assault with intent to rob, being at the time armed with an offensive weapon or instrument or being in company with other persons; or who shall rob, and at the time of or immediately before or after such robbery wound, beat, strike, or use personal violence to any person,—may be sentenced to penal servitude *for life*, or not less than five years, if that species of punishment be awarded (*p*); but here, also, he may, at the discretion of the court, be sentenced to the alternative punishment of imprisonment, to the extent and in the manner already particularized (*q*); and to this (by a later provision) the infliction of *whipping* may be added (*r*).

In connexion with the crime of robbery, may here be mentioned the provisions which have been framed to repress the offence of extorting by *threats* money and other valuables. And, first (with the exception of the whipping), the same punishments as last mentioned are awarded to the felonious act of sending, delivering or uttering, or directly or indirectly causing to be received, knowing its contents, a letter or other writing demanding, with menaces and without reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing (*s*). And penal servitude for five years, or imprisonment to the extent

(*o*) 24 & 25 Vict. c. 96, ss. 41, 42.

(*p*) See 27 & 28 Vict. c. 47.

(*q*) 24 & 25 Vict. c. 96, s. 43. The provision previously in force (7 Will. 4 & 1 Vict. c. 87, ss. 2, 3, repealed by 24 & 25 Vict. c. 95), made robbery, accompanied with wounding, &c., a *capital* felony.

(*r*) 26 & 27 Vict. c. 44.

(*s*) 24 & 25 Vict. c. 96, s. 44. This and the following provision are in substitution of 7 & 8 Geo. 4, c. 29, s. 8, and 7 Will. 4 & 1 Vict. c. 87, ss. 7, 12, repealed by 24 & 25 Vict. c. 95.

of two, is awarded to whomever shall demand with menaces or by force any property, chattel, money, valuable security or valuable thing, with intent to steal the same (*t*).

Moreover penal servitude for life or a term of years, or the alternative sentence of imprisonment—with or without hard labour, solitary confinement and whipping,—may be awarded to whomever shall commit the felonious crime of sending, delivering or uttering, or directly or indirectly causing to be received by any other person, a letter or writing, accusing or threatening to accuse any one of some crime punishable by law with death or by penal servitude for not less than seven years (*u*),—or of an assault or attempt or endeavour to commit any rape or infamous crime,—but it must appear that the person accused knew of its contents, and acted with a view or intent thereby to extort or gain something from some person (*v*); and the same punishments may be awarded to whomever shall accuse or threaten to accuse either the person to whom such accusation or threat shall be made, or any other person, of any of the above crimes, with the view or intent of such extortion or gain, either from the person accused or threatened, or from any other person (*x*);—and (with the exception of the *whipping*) may be awarded to whomever, with intent to defraud or injure another, shall by unlawful violence, restraint or threat to the person of

(*t*) 24 & 25 Vict. c. 96, s. 45; 27 & 28 Vict. c. 47.

(*u*) See also 6 & 7 Vict. c. 96, s. 3, as to the offence of threatening to publish or offering to abstain from publishing a *libel* with intent to extort money, &c.

(*v*) 24 & 25 Vict. c. 96, s. 46. This section (which is in substitution for the repealed 7 & 8 Geo. 4, c. 29, s. 8) defines "the infamous crimes" to which it refers. See also as to the menaces or threats used, 24 & 25 Vict. c. 96, s. 49.

(*x*) Sect. 47, framed on 10 & 11 Vict. c. 66, s. 2, repealed by 24 & 25 Vict. c. 95. It is remarked in the Report of the Criminal Code Bill Commission (p. 29) that under the existing law of extortion as regulated by the above enactments, "a policeman or gamekeeper who levies blackmail under threats of accusing of larceny or poaching, if criminally responsible at all, is only punishable with imprisonment and fine."

another, or by accusing or threatening to accuse him of any treason, felony or infamous crime, compel or induce him to execute, make, accept, indorse, alter or destroy any valuable security; or to affix his name or the name of any other person or of any company, firm or co-partnership, or the seal of any corporation or society, to any paper or parchment, in order that the same may be converted into a valuable security (*y*).

4. Larceny or embezzlement *by clerks, servants, &c.* Special provision against larcenies of this character was made by the statutes 33 Hen. VI. c. 1, and 21 Hen. VIII. c. 7; but both of these Acts were repealed by 7 & 8 Geo. IV. c. 27. By the enactments at present in force on the subject, contained in 24 & 25 Vict. c. 96, it is provided, that whoever, being a clerk or servant, or person employed in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security, belonging to or in the possession or power of his master, shall be guilty of felony, and liable to penal servitude for a term not exceeding fourteen years, nor less than five years (*z*); or he may be imprisoned (with or without hard labour or solitary confinement) for a term not exceeding two years; and, if a male under the age of sixteen, may be whipped, if the court think fit, in addition to the imprisonment (*a*). And if such larceny be committed by one employed in the public service of her Majesty, or by a constable or other person employed in the police,—the thing stolen belonging to or being in the possession or power of her Majesty, or intrusted to or received by the thief in virtue of his employment,—the same punishments as last mentioned (with the exception of whipping) may be awarded (*b*). And in addition to these provisions, there are separate enactments against

(*y*) 24 & 25 Vict. c. 96, s. 48.

(*z*) See 27 & 28 Vict. c. 47.

(*a*) 24 & 25 Vict. c. 96, s. 67. This enactment is in the place of 7 & 8 Geo. 4, c. 29, s. 46, repealed by 24 & 25 Vict. c. 95.

(*b*) 24 & 25 Vict. c. 96, s. 69. See Reg. *v.* Moah, 25 L. J. (M. C.) 66.

embezzlement; a crime distinguished from larceny (properly so called), as being committed in respect of property which is not, at the time, in the actual or legal possession of the owner (*c*). As to this offence it is enacted, that whoever, being a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received, or taken into possession by him, for or in the name or on the account of his master, shall be deemed to have feloniously stolen the same and punished accordingly (*d*): and that similar penalties shall attach if the offender be one employed in the service of her Majesty or in the police, and shall have been entrusted by virtue thereof with the receipt, custody, management or control of what he embezzled (*e*). And where the act of embezzlement has been committed by an officer or servant of the Bank of England or Ireland, in respect of some security, money or effects lodged at the Bank, or with him as its

(*c*) See R. *v.* Gill, 1 Dearsley's C. C. R. 289. As to the *indictment* for embezzlement, see 24 & 25 Vict. c. 96, s. 71. Upon the distinction between theft and embezzlement, the Report of the Criminal Code Bill Commission contains the following remarks: "The immediate consequence of the doctrine that a wrongful taking is of the essence of theft, is that if a person obtains possession of a thing innocently and afterwards fraudulently appropriates it, he is guilty of no offence. This doctrine has been qualified by a number of statutory exceptions, each of which has been attended with difficulties of its own;" and after explaining the course of legislation on this matter, the Commissioners proceed —"The common law rule, though thus nearly eaten up by exceptions, still survives as to all persons who come innocently into possession of the property of others, otherwise than as clerks, servants, bankers, merchants, brokers, solicitors, factors, and other agents or bailees," —a state of the law which "is obviously most objectionable not only on account of its extreme intricacy and technicality, but also because the numerous exceptions to the common law rule are inconsistent with the principle on which it depends" (p. 28).

(*d*) 24 & 25 Vict. c. 96, s. 68. (See The Queen *v.* Negus, Law Rep., 2 C. C. R. 34; Same *v.* Foulkes, ib. 150. The punishment for theft is particularized sup. p. 134. A verdict for embezzlement may be had on an indictment, charging larceny, and *vice versâ*. (Sect. 72.)

(*e*) Sect. 70.

officer or servant, the term of penal servitude may be for *life* (*f*). With respect to fraudulent appropriation by *agents* and others, not amounting in legal contemplation either to larceny or felonious embezzlement, but still proper to be repressed by highly penal enactments, other provisions have been made. Thus it is enacted, that any person entrusted with money or valuable security in the capacity as a *banker*, *merchant*, *broker*, *attorney*, or other *agent*, and with a written direction to apply the same in some specified manner—who shall, in violation of good faith and contrary to such direction, convert the same to the use or benefit of any one other than the person by whom he was so entrusted, is guilty of a *misdemeanor*; and he may for such offence be sentenced to penal servitude for a term not exceeding seven years, nor less than five years, or to imprisonment not exceeding two years with or without hard labour and solitary confinement (*g*). Again, if a chattel or valuable security, or power of attorney for the sale or transfer of a share or interest in any stock or fund,—shall be entrusted to a banker, merchant, broker, attorney or other agent, either for safe custody or for some special purpose;—and he shall, in violation of good faith and contrary to such purpose, sell, negotiate, transfer, pledge, or in any manner convert the same to the use or benefit of one other than him by whom he was entrusted;—every such offender shall incur the same penalties, as are imposed in the case last before mentioned (*h*). It is provided, however, that these enactments relative to *agents* shall not be construed so as to affect a *trustee* or *mortgagee* in respect of an act done by him in relation to the property comprised in the trust or mortgage: nor shall it restrain a banker, merchant, broker, attorney or other agent, from receiving money due upon any

(*f*) 24 & 25 Vict. c. 96, s. 73.

(*g*) Sect. 75. See 27 & 28 Vict. c. 47.

(*h*) 24 & 25 Vict. c. 96, s. 75 (see The Queen *v.* Christian, Law Rep., 2 C. C. R. 94; Same *v.* Cooper, ib. p. 123; Same *v.* Tatlock, 2 Q. B. D. 157). The section is framed on 7 & 8 Geo. 4, c. 29, ss. 49, 50; repealed by 24 & 25 Vict. c. 95. As to the punishment see also 27 & 28 Vict. c. 47.

valuable security, in such manner as he might otherwise have lawfully done: nor from disposing of securities or effects in his possession, upon which he shall have a lien, claim, or demand, which entitles him to dispose thereof,—unless such disposal shall extend to more than shall be requisite for satisfying such lien, claim or demand (*i*). It is also enacted, that any banker, merchant, broker, attorney, or agent, entrusted with any *property* for safe custody (*k*); or with any power of attorney for the sale or transfer of any property,—who shall fraudulently convert or appropriate the same to the use or benefit of one other than the person by whom he was entrusted, shall be guilty of a misdemeanor; and be punishable in the manner and to the extent as in the misdemeanor last before mentioned (*l*). And also that any *factor* or agent entrusted with the possession of goods or documents of title to goods, who shall without the authority of his principal, for the use or benefit of any person other than him, and in violation of good faith, make any consignment, deposit, transfer or delivery of such goods or documents, by way of a pledge or security for money or valuable security borrowed by such factor or agent,—or who shall accept advances on the faith of an agreement to pledge such goods or documents, shall incur the same penalties as in the two former cases (*m*). But no factor or agent shall be liable to prosecution for consigning, depositing, transferring or delivering such goods or documents, provided the same shall not be made a security for more than the amount justly owing to him at the

(*i*) 24 & 25 Vict. c. 96, s. 75.

(*k*) The term "property" in the interpretation of 24 & 25 Vict. c. 96, includes every description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods. (Sect. 1.)

(*l*) Sects. 76, 77. Provisions to the same effect were contained in the Fraudulent Trustees Act (20 & 21 Vict. c. 54), now repealed by 24 & 25 Vict. c. 95.

(*m*) 24 & 25 Vict. c. 96, s. 78. This is framed on the 5 & 6 Vict. c. 39, s. 6, now repealed by 24 & 25 Vict. c. 95.

time from his principal, together with the amount of any bill drawn by or on account of the principal and accepted by the factor or agent (*n*).

In addition to all of which provisions, it is also enacted that a person offending in any of the cases following (*o*), shall be guilty of a misdemeanor, and punishable by penal servitude for seven years, or by imprisonment to the extent of two, with or without hard labour and solitary confinement, as for the misdemeanors already mentioned:— 1. Any *trustee* of property for some other person, or for some public or charitable purpose, who shall (with intent to defraud,) convert or appropriate the same, to the use or benefit of any one other than such person, or for any purpose other than that of the trust, or who shall otherwise dispose of such property (*p*). 2. Any director, member, or public officer of any body corporate or public company, who shall fraudulently take or apply for his own use or benefit, or for any use or purpose other than the use or purpose of such body or company, any part of the property thereof (*q*). 3. Any director, public officer, or manager of

(*n*) 24 & 25 Vict. c. 96, s. 78.

(*o*) The provisions here following are framed on the 20 & 21 Vict. c. 54, repealed by 24 & 25 Vict. c. 95.

(*p*) 24 & 25 Vict. c. 96, s. 80. A "trustee" is, for the purposes of this Act, a trustee on some express trust created by some deed, will, or instrument in writing; and the term includes the heir or personal representative of such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come; and also an executor and administrator, official manager, assignee, liquidator, or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency. (Sect. 1.) It is to be noticed that a prosecution for the first misdemeanor above mentioned, against a *trustee*, can only be undertaken by the sanction of the attorney-general; or (in case that office be vacant) of the solicitor-general; and, also, that "where any civil "proceeding shall have been taken "against any person to whom its "provisions apply, no person who "shall have taken such civil pro-"ceeding shall commence any "prosecution under it without the "sanction of the court or judge "before whom such civil proceed-"ing shall have been heard, or is "pending." (Sect. 80.)

(*q*) Sect. 81.

such body or company, who shall, as such, receive or possess himself of any of the property thereof (otherwise than in payment of a just debt or demand), and who shall, with intent to defraud, omit to enter the same in the books and accounts (*r*): or who shall make, circulate or publish, or concur in making, circulating or publishing, any written statement or account, which he shall know to be false in some material particular, with intent to deceive or defraud any member, shareholder or creditor of such body or company; or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance money or property to such body or company, or to enter into some security for the benefit thereof (*s*). And 4. Any director, manager, public officer, or member of such body or company, who shall, with intent to defraud, destroy, alter, mutilate or falsify any of its books, papers, writings, or valuable securities; or who shall, with such intent, make or concur in the making of a false entry, or material omission, in any book of account or other document (*t*). There is, moreover, a provision that no criminal proceeding in respect of the above misdemeanors shall affect any remedy, at law or in equity, which a person aggrieved by them might otherwise have had (*u*); or affect any agreement or security given by a trustee, having for its object the restoration or repayment of trust property mis-appropriated (*x*).

5. Larcenies, &c. *in relation to the Post office.* By 7 Will. IV. & 1 Vict. c. 36, every person employed under the Post office, who shall, contrary to his duty, open or procure or suffer to be opened, or wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall be guilty of a misdemeanor; and may be punished by fine or imprisonment, or both, as to the court shall seem

(*r*) 24 & 25 Vict. c. 96, s. 82.
(*s*) Sect. 84.
(*t*) Sect. 83.
(*u*) Sect. 86. But, on the other hand, no conviction shall be received in evidence against the offender, either at law or in equity.
(*x*) 24 & 25 Vict. c. 96, s. 85.

meet (*a*). By other provisions, every person so employed, who shall steal, or for any purpose embezzle, secrete or destroy a post letter, shall be guilty of felony, and he is punishable with penal servitude for not more than seven nor less than five years, or with imprisonment (with or without hard labour and solitary confinement) for not more than two years (*b*): and if the letter contain any chattel, money, or valuable security, then the term of penal servitude may be *for life* (*c*). Again, every person so employed, who shall steal, or, for any purpose, embezzle, secrete or destroy, or wilfully detain or delay in the course of conveyance or delivery by post, any printed votes or proceedings in parliament, or any printed newspaper or other printed paper sent by the post without covers, or in covers open at the sides,—shall be guilty of a misdemeanor punishable by fine or imprisonment, or both, as to the court shall seem meet (*d*). These provisions relate only to offences by persons employed in the Post office: but by other enactments, *any* person who shall steal out of a post letter any chattel or money or valuable security; or shall steal a post letter-bag; or a post letter from a post letter-bag, or from a post office or officer of the post, or a mail; or shall stop a mail with intent to rob or search the same; shall be guilty of felony: and he may be sentenced to the same punishments as for the felony last before mentioned (*e*). And any person who shall steal or unlawfully take away

(*a*) 7 Will. 4 & 1 Vict. c. 36, s. 35.

(*b*) 7 Will. 4 & 1 Vict. c. 36, s. 26; and see 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

(*c*) 7 Will. 4 & 1 Vict. c. 36, ss. 25, 41, 42; and see 3 & 4 Vict. c. 96; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to these provisions, see R. *v.* Rathbone, 1 Car. & M. 220; R. *v.* Mence, ib. 234; R. *v.* Young, 2 Car. & K. 466; R. *v.* Glasse, 2 Cox's Cr. C. 236; R. *v.* Reason, 1 Dearsley's Cr. C. R. 226; and R. *v.* Shepherd, ib. 606.

(*d*) 7 Will. 4 & 1 Vict. c. 36, s. 32.

(*e*) 7 Will. 4 & 1 Vict. c. 36, ss. 27, 28, 41, 42; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to this offence, see R. *v.* Harley, 1 Car. & Kir. 89.

a post letter-bag sent by a Post office packet, or a letter out of such bag; or who shall unlawfully open any such bag;—shall be guilty of felony: and he may be sentenced to the same punishments, except that, if by way of penal servitude, the term must not exceed fourteen years (*f*). And any person who shall fraudulently retain, or wilfully secrete, or keep, or detain; or, on being required so to do by some officer of the Post office, shall neglect or refuse to deliver up a post letter, which ought to have been delivered to some other person; or who shall neglect or refuse to deliver up a post letter-bag, or post letter which shall have been sent and lost, and which shall have come into his possession;—shall be guilty of a misdemeanor, and be punishable with fine and imprisonment (*g*).

Having now considered the several kinds of larcenies, whether simple or with aggravation, we must refer, under the same head, to that offence so closely connected with larceny itself, of *receiving stolen property knowing the same to have been stolen* (*h*). This offence was, at common law, a misdemeanor only; but was afterwards made felony by several statutes not in force at the present day (*i*).

(*f*) 7 Will. 4 & 1 Vict. c. 36, ss. 29, 41, 42; and see 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; R. *v.* Jones, 2 Car. & K. 236.

(*g*) 7 Will. 4 & 1 Vict. c. 36, s. 31. By 11 & 12 Vict. c. 88, s. 4, every officer of the Post office who shall grant or issue any *money order* with a fraudulent intent, shall be guilty of felony: and he is liable, at the discretion of the court, to penal servitude for not more than seven nor less than five years, or imprisonment for any term not exceeding three years. (11 & 12 Vict. c. 88, s. 4; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.)

(*h*) As to the *indictment* for this offence, see 24 & 25 Vict. c. 96, s. 92, making it lawful, in an indictment for *stealing*, to add a count for receiving the same property, knowing it to have been stolen.

(*i*) In the time of Blackstone receivers of stolen property might be indicted as accessories after the fact and transported for fourteen years. He remarks (vol. iv. p. 38), that in France such receivers were punished with death; and that, according to the Gothic constitution, there were three sorts of thieves, "*unum qui consilium daret, alterum qui contrectaret, tertium qui receptaret et occu-*

It is, however, now provided by 24 & 25 Vict. c. 96, s. 91, that whoever shall receive any chattel, money, or valuable security, or other property whatever (knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of), the stealing, taking, extorting, obtaining, embezzling or otherwise disposing whereof shall amount to *felony*, either by common law or by virtue of that Act, shall himself be guilty of felony (*k*); and he may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and that whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and, however convicted, such guilty receiver is liable at the discretion of the court to penal servitude for a term not exceeding fourteen years nor less than five years, or to imprisonment, (with or without hard labour and solitary confinement,) for a term not exceeding two years; and, if a male under the age of sixteen, he may also be whipped, if the court think fit, in addition to any other imprisonment awarded (*l*). If, however, the thing received was such that its stealing, taking, obtaining, converting or disposal is made a *misdemeanor* by the 24 & 25 Vict. c. 96, then its guilty reception is also a misdemeanor only, and is punishable with penal servitude to the extent of seven years, or by imprisonment, as in the case of the felonious offence (*m*). And where the stealing or taking of the property guiltily received is punishable by the same Act by way of summary conviction, either for every offence, or for the first and second offences only, or for the first offence only,—the guilty receiver may also be summarily convicted; and he is liable for every first, second, or subsequent offence of

leret; pari pœnæ singulos obnoxios." —And he cites Stiern. de Jure Goth. l. 3, c. 5.

(*k*) It is immaterial that the intention with which he receives them, is for concealment and not for profit. (R. *v.* Richardson, 6 Car. & P. 335; R. *v.* Davis, ib. 177.)

(*l*) 24 & 25 Vict. c. 96, s. 91. See 27 & 28 Vict. c. 47.

(*m*) 24 & 25 Vict. c. 96, s. 95.

receiving, to the same consequences as those to which a person guilty of a first, second, or subsequent offence of stealing or criminally taking such property, is made liable (*n*).

Moreover, with the intention of removing, so far as possible, the temptation to this species of crime, it was provided by the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), ss. 10, 11, that every person who occupies or keeps a lodging, beer or public house or place of public entertainment or resort, or any brothel, who knowingly lodges or harbours therein *thieves* or *reputed* thieves, shall be liable to a penalty not exceeding 10*l.*, and in default of payment may be imprisoned for four months, with or without hard labour (*o*).

II. [*Malicious mischief* is another species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; which is some, though a weak excuse; but either out of a spirit of wanton cruelty, or of black and diabolical revenge; in which it bears a near relation to the crime of arson: for as that affects the habitation, so this does the other property of individuals.] And therefore any damage arising from this mischievous disposition, though considered only in the light of a trespass at common law, is by a multitude of

(*n*) 24 & 25 Vict. c. 96, s. 98. As to guilty receivers in the case of anchors, &c., see 1 & 2 Geo. 4, c. 76, s. 10; 9 & 10 Vict. c. 99, s. 29. In the case of *post letters*, &c., see 7 Will. 4 & 1 Vict. c. 36, ss. 30, 41, 42; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47. In order, as far as possible, to prevent this crime in reference to articles affording peculiar temptations, dealers in *marine stores* are placed under regulations by 17 & 18 Vict. c. 104, s. 480, and in *old metals* by 34 & 35 Vict. c. 112, s. 13. See also 27 & 28 Vict. c. 91, ss. 3, 10, 11.

(*o*) See Marshall *v.* Fox, Law Rep., 6 Q. B. 370. As to searching for stolen property, see 34 & 35 Vict. c. 112, s. 16. As to the evidence to prove guilty knowledge, ib. s. 19.

enactments (now consolidated into a single statute) made highly penal.

The statute here referred to is in substitution of a prior Act with a similar object (the 7 & 8 Geo. IV. c. 30); and it is the 24 & 25 Vict. c. 97, passed in the year 1861, "to consolidate and amend the statute law relating to malicious injuries to property" (*p*). And as to such injuries we may premise in general that though malice is the usual motive for this class of crimes, yet the statute contains an express enactment that its provisions shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise (*q*). Some of the provisions of this Act are noticed in other parts of the work, and they are too numerous for complete enumeration. It may be mentioned, however, that it makes specific provision against malicious injuries to silk, woollen, linen, cotton, hair, mohair, or alpaca goods *in the process of manufacture*, or to the machines employed therein (*r*); to machines used in other manufactures (*s*); to hop-binds (*t*); to dwelling-houses and other buildings (*u*); to

(*p*) The numerous statutes cited by Blackstone in reference to malicious injuries to property, were repealed by 7 & 8 Geo. 4, c. 27.

(*q*) 24 & 25 Vict. c. 97, s. 58. See as to this the case of Reg. *v.* Child, Law Rep. (1 C. C. R. 307), referred to in the Report of the Criminal Code Bill Commission, p. 30. See also The Queen *v.* Pembliton, ib. 2 C. C. R. 119.

(*r*) Sect. 14; felony, extreme of penal servitude, *life*. Where the prisoner is convicted on indictment for either a *felony* or a *misdemeanor* under this Act, and the punishment inflicted is by way of *imprisonment*, it may be to the extent of two years, with or without hard labour and solitary confinement, and, if a male under sixteen, whipping.

(*s*) Sect. 15, felony, *seven years*. (See The Queen *v.* Fisher, Law Rep., 1 C. C. R. 7.)

(*t*) Sect. 19, felony, *fourteen years*.

(*u*) Sects. 9, 10. If by explosion of gunpowder or other explosive substance in a dwelling-house, and the life of any person be endangered, felony, *life;* if by placing such explosive substance in any building, with intent to destroy it, felony, *fourteen years*. By sect. 13, any *tenant* of a building unlawfully and maliciously pulling it or any part of it down in severing fixtures, is guilty of a *misdemeanor*.

trees and shrubs adjoining dwelling-houses (*x*), or elsewhere (*y*); to garden produce (*z*); to vegetable productions growing elsewhere (*a*); to fences (*b*); to mines (*c*), and mining engines (*d*); to sea banks and walls (*e*); to navigable rivers and canals (*f*); to ponds (*g*); to bridges and viaducts (*h*); to turnpike gates (*i*); to railway and railway carriages or engines (*k*); to electric or magnetic telegraphs (*l*); to works of art in public places (*m*); to cattle (*n*); to other animals (*o*); to ships and vessels (*p*); to buoys and sea marks (*q*); and to wrecks (*r*). And all of these injuries are made,—according to their several degrees of mischief or malignity,—either felonies or misdemeanors, or else offences such as may be disposed of, by way of summary conviction, before a justice of the peace (*s*). The Act also contains a general provision, that whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property

(*x*) 24 & 25 Vict. c. 97, s. 20, (if injury done exceed 1*l*.,) felony, *five years*. (See 27 & 28 Vict. c. 47.)

(*y*) 24 & 25 Vict. c. 97, s. 21, (if injury done exceed 5*l*.,) felony, *five years*. (See 27 & 28 Vict. c. 47.) If, however, the injury to the tree, &c., *wherever* growing, do not amount to 1*s*., then a first offence is only punishable by way of summary conviction.—Sect. 22.

(*z*) Sect. 23, first offence, *summary conviction;* second offence, felony, extreme of penal servitude, *five years*. (27 & 28 Vict. c. 47.)

(*a*) Sect. 24, *summary conviction*.

(*b*) Sect. 25, *summary conviction*.

(*c*) Sect. 28, felony, *seven years*.

(*d*) Sect. 29, felony, *seven years*.

(*e*) Sect. 30, felony, *life*.

(*f*) Sect. 31, felony, *seven years*.

(*g*) Sect. 32, felony, *seven years*.

(*h*) Sect. 33, felony, *life*.

(*i*) Sect. 34, misdemeanor, *fine and imprisonment as at common law*.

(*k*) Sect. 35, felony, *life*. And see sect. 36, as to misdemeanor, by *obstructing* engines, &c., by any unlawful act, or wilful omission or neglect.

(*l*) Sects. 37, 38, misdemeanor, *imprisonment*.

(*m*) Sect. 39 (re-enacting 8 & 9 Vict. c. 44, repealed by 24 & 25 Vict. c. 95), misdemeanor, *imprisonment*.

(*n*) Sect. 40, felony, *fourteen years*.

(*o*) Sect. 41, *summary conviction*.

(*p*) Sects. 42—47, felony, *life*, *fourteen* or *seven years*, according to the nature of the injury.

(*q*) Sect. 48, felony, *seven years*.

(*r*) Sect. 49, felony, *fourteen years*.

(*s*) Vide post, Chapter on Summary Convictions.

whatever, either of a public or private nature, for which it provides no other punishment, shall be guilty of a misdemeanor, (provided the injury shall exceed the value of 5*l.*,) and be liable to imprisonment (with or without hard labour) to the extent of two years; and if the offence be committed *by night*, may be sentenced either to such imprisonment or to penal servitude to the extent of five years (*t*). And another, that such offenders as last mentioned, in cases where the damage does *not* exceed the value of 5*l.*, may be summarily convicted before a justice of the peace, and may either be committed to prison (with or without hard labour) to the extent of two months, or else shall forfeit such sum of money (not exceeding five pounds) as shall appear to the said justice a reasonable compensation for the damage committed: which sum, in the case of private property, shall be paid to the party aggrieved; but, when property of a public nature or a public right is concerned, shall be paid over to the treasurer of the county, borough or place for which the convicting justice acts (*u*). There is, however, a proviso that nothing in either of these provisions shall extend to any case where a party trespassing, acted under a fair and reasonable supposition that he had a right to do the act complained of; nor to any trespass, (not being wilful or malicious,) committed in hunting, fishing, or the pursuit of game (*x*).

III. [*Forgery* (or the *crimen falsi*) is an offence which was punished by the civil law with deportation or banishment, and sometimes with death (*y*). It may with us be defined to be, the fraudulent making or alteration of a writing, or seal, to the prejudice of another man's right; or of a stamp, to the prejudice of the revenue (*z*).] In

(*t*) 24 & 25 Vict. c. 97, s. 51. (See the Queen *v.* Pembliton, Law Rep., 2 C. C. R. 119.)

(*u*) See 11 & 12 Vict. c. 43, s. 31.

(*x*) 24 & 25 Vict. c. 97, s. 52. See also sect. 53.

(*y*) 4 Inst. 18, 7.

(*z*) 2 East, P. C. c. xix. s. 60.

reference to this crime, as regards writings, it has, among other points, been decided, that the instrument forged must so far resemble the true instrument as to be capable of deceiving persons who use ordinary observation (*a*): that any material alteration, (however slight,) is a forgery, as well as an entire fabrication (*b*): that the fraudulent application of a false signature to a true instrument, or a real signature to a false one, are both forgeries (*c*): and that even if the name forged be merely a fictitious one, it is as much forgery, if done for the purpose of fraud, as if the name were that of a real person (*d*). It may also be remarked, that by 9 Geo. IV. c. 32, it was provided—even before the change of law, by which interested parties were made competent witnesses in criminal as well as civil inquiries (*e*),—that the party whose name was forged might be called as a witness to prove that the writing is not his. But on the other hand, it is an established rule, that the proof of forgery by a mere comparison of handwriting is not admissible (*f*). At common law, this offence was a misdemeanor only (*g*): but when, in the progress of society, the perpetration of it became more easy, and its tendencies more dangerous, it became necessary to assign to it a more penal character, as regards those instruments which most required protection.

A statute passed in the year 1861 (24 & 25 Vict. c. 98) consolidated and amended the law relating to forgery (*h*);

(*a*) R. *v.* Collicott, R. & R. C. C. R. 212; S. C. 229.

(*b*) 2 East, P. C. c. xix. s. 4.

(*c*) 3 Chit. Crim. Law, 1038, cites 1 Hale, P. C. 683; et vide 2 East, P. C., ubi sup.

(*d*) R. *v.* Bontein, R. & R. C. C. R. 260.

(*e*) This was by 6 & 7 Vict. c. 85.

(*f*) Doe *v.* Suckermore, 5 A. & E. 703. See Taylor on Evidence, p. 1428, n. (5), 2nd edit.

(*g*) In the Report of the Criminal Code Bill Commission it is remarked (p. 29), that "it is not possible to say precisely what are the documents the false making of which is forgery at common law."

(*h*) This Act, which has been supplemented by the 33 & 34 Vict. c. 58 (the Forgery Act, 1870), is in substitution of the 11 Geo. 4 & 1 Will. 4, c. 66, which, so far as it relates to our present subject, is repealed by 24 & 25 Vict. c. 95. There are also a variety of

and, among other enactments, it provides against the felonious offence of forging the great seal of the united kingdom, the privy seal or any privy signet, the sign-manual, the seals of Scotland, or the great seal and privy seal of Ireland (*i*). It also makes it a felony to forge any stamp, exchequer bill, bank of England or other note, bill of exchange, promissory note, deed (*k*), receipt (*l*), order for the payment of money (*m*), transfer of stock, or will,—or any records or proceedings of courts, court rolls, registers of deeds, registers of births marriages and deaths, marriage licences,—and a variety of other documents, comprising indeed all that are in the most ordinary use in the transactions of mankind. It attaches also the same felonious character to the offence even of having in possession, without lawful excuse, (such excuse to be proved by the party accused,) any forged bank-note or the like, knowing it to be forged (*n*); or of having in possession, (without such excuse,) any frames, mould, plates, paper, &c., used in making bank-notes, or any paper with the name of any bank visible on the substance thereof (*o*).

The punishment of forging, uttering and the like at common law, or in those instances in which the offence was made by some statute a mere misdemeanor, was fine, imprisonment and the pillory; but in the cases in which it

earlier statutes, containing provisions against forgery in particular cases, and especially with regard to *records and process of courts, the public funds and stocks*, the *securities of public companies* and *official documents*. As to these (many of which appear to be practically superseded by the recent Act), we must refer the reader to the treatises on criminal law.

(*i*) 24 & 25 Vict. c. 98, s. 1. Antecedently to this Act, the offence of counterfeiting the Great Seal, &c. amounted to *treason*. This was formerly a capital offence, but under 11 Geo. 4 & 1 Will. 4, c. 66, it was made punishable with transportation for life.

(*k*) See The Queen *v.* Ritson, Law Rep., 1 C. C. R. 200; *v.* Morton, 2 C. C. R. 22.

(*l*) See Clark *v.* Newsam, 1 Exch. 131; The Queen *v.* French, Law Rep., 1 C. C. R. 217.

(*m*) See The Queen *v.* Dawson, 20 L. J. (M. C.) 102; *v.* Chambers, Law Rep., 1 C. C. R. 341.

(*n*) 24 & 25 Vict. c. 98, s. 13.

(*o*) Sects. 14, 18.

was made by statute felonious, it was at one time deemed necessary also to inflict on the offender the extreme penalty of death. Capital punishment, however, — having been previously taken away with regard to many cases of forgery, by 11 Geo. IV. & 1 Will. IV. c. 66, and 2 & 3 Will. IV. c. 123,—was altogether abolished, as a punishment for this offence, by 7 Will. IV. & 1 Vict. c. 84 (*p*). And now (under the 24 & 25 Vict. c. 98, above referred to) the felon convicted of any of the forgeries provided against by that Act, may be sentenced to penal servitude—the extreme term which may be awarded varying according to the document forged; or else (at the discretion of the court) to imprisonment for not more than two years, with or without hard labour and solitary confinement (*q*).

The same statute of 24 & 25 Vict. c. 98, also contains enactments against other practices *connected* with, or aiding

(*p*) It remained a capital offence, till the Act last mentioned, to forge a will or testamentary writing, a power of attorney or other authority to transfer stock or receive dividends; and certain other instruments. (See 2 & 3 Will. 4, c. 123; 5 & 6 Will. 4, cc. 45, 51.)

(*q*) The following are the severest sentences which may be given by way of penal servitude for the different forgeries provided against by 24 & 25 Vict. c. 98: (sect. 1) forging, &c. the Seals, *life;* (sect. 2) stock transfers or powers of attorney, *life;* (sect. 4) attestation of stock transfers or powers of attorney, *seven years;* (sect. 5) entries in the books of the Bank of England or Ireland, *life;* (sect. 7) India bonds, *life;* (sect. 8) exchequer bills, bonds, &c., *life;* (sect. 12) bank notes, *life;* (sect. 20) deeds, *life;* (sect. 21) wills, *life;* (sect. 22) bills of exchange or promissory notes, *life;* (sect. 23) orders, receipts, &c., for money, *life;* (sect. 26) debentures, *fourteen years;* (sect. 27) records or proceedings of courts, *seven years;* (sect. 28) copies or certificates of records, &c., or process, *seven years;* (sect. 29) instruments made evidence by act of parliament, *seven years;* (sect. 30) court rolls relating to copyholds, *life;* (sect. 31) registers of deeds, *fourteen years;* (sect. 32) orders of justices of the peace, *five years*, see 27 & 28 Vict. c. 47; (sect. 33) certificates, &c., of accountant-general, &c., *fourteen years;* (sect. 35) marriage licences, *seven years;* (sects. 36, 37) registers of births, baptisms, marriages, deaths, or burials, *life*. In all of the above forgeries, however, punishment by way of imprisonment, instead of penal servitude, may be awarded at the discretion of the court to the extent of two years, and with or without hard labour and solitary confinement.

the perpetration of, the crime of forgery: and these also in most cases are made felonies, and punishable with penal servitude or imprisonment. Of these our limits will not allow us to give a complete enumeration, but they comprise the following:—making paper, &c., in imitation of that used for exchequer bills or bonds (*r*);—purchasing forged notes, bank paper or bills (*s*);—making or engraving plates, moulds, &c., for bank-notes (*t*);—writing acceptances across bills, notes, &c., without authority, and with intent to defraud (*u*);—obliterating or altering marks on cheques or drafts, signifying they are to be paid through a banker (*x*);—falsely acknowledging recognizances or bail (*y*);—destroying or making false entries in registers (*z*);—and demanding (with intent to defraud) property on any forged instrument (*a*).

It has also since the above statute, viz., by 25 & 26 Vict. c. 88, been made a *misdemeanor*, fraudulently to forge or counterfeit any *trade mark* lawfully used by any other person to denote that any chattel or thing therewith marked is of his own manufacture or merchandize, or in respect of which he has any copyright (*b*); and such offence (besides the forfeiture of the articles impressed with such forged or counterfeited marks) is made punishable by fine or imprisonment, or both. If imprisonment is awarded, it may be to the extent of two years, with or without hard labour (*c*).

Lastly by the Forgery Act, 1870 (33 & 34 Vict. c. 58), the forgery of stock certificates or coupons, issued by the bank of England in payment of interest of the National Debt,—or the personation of the owners of such stock,—

(*r*) 24 & 25 Vict. c. 98, sects. 9, 10, *seven years*.
(*s*) Sect. 13, *fourteen years*.
(*t*) Sects. 14—19, *fourteen years*.
(*u*) Sect. 24, *fourteen years*.
(*x*) Sect. 25, *life*.
(*y*) Sect. 34, *seven years*.
(*z*) Sects. 36, 37, *life*.
(*a*) Sect. 38, *fourteen years*. See also 30 & 31 Vict. c. 131, s. 36, as to engraving *share warrants* or *coupons*.
(*b*) The definition of "copyright" in reference to the crime of forgery is given in 24 & 25 Vict. c. 98, s. 1.
(*c*) 25 & 26 Vict. c. 88, s. 14.

is made felony, and punishable with penal servitude for life or not less than five years, or imprisonment to the extent of two years, with or without hard labour and solitary confinement.

IV. *Obtaining property by false personation* (*d*). Frauds of this description were indictable, at common law, as misdemeanors, and made punishable by fine and imprisonment (*e*), but they are now also made penal by the express provision of acts of parliament. By these statutes, to personate any soldier, in order fraudulently to receive his pay, pension, prize money, or wages, is felony; and punishable with imprisonment to the extent of two years (with or without hard labour), or by penal servitude for life or not less than five years (*f*). Again, to personate (with a fraudulent intention) any seaman or marine (*g*); or falsely and deceitfully to personate the owner of any share or interest in stock of the Bank of England or Ireland, or of any corporation or society established by charter or act of parliament; or the owner of any dividend payable in respect thereof:—and thereby to endeavour to transfer the share or receive money due to the true owner, are, all of them, felonies, and make the offender liable to the punishments above specified (*h*). Moreover, by the False Personation Act, 1874, if any person shall falsely and deceitfully personate any person—or his representatives, wife, widow, next of kin or relation—with intent fraudulently to obtain any land, estate, chattel, money, valuable security or property, he shall be guilty

(*d*) By 22 & 23 Vict. c. 17, and 30 & 31 Vict. c. 35, if an indictment alleging this offence shall be presented to, or found by, a grand jury, security for the due prosecution of the charge must, in some cases, be given.

(*e*) 2 East, P. C. c. xx. s. 5.

(*f*) See 7 Geo. 4, c. 16, s. 38; 2 & 3 Will. 4, c. 53, s. 49; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

(*g*) See 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*h*) 24 & 25 Vict. c. 98, s. 3. See also 30 & 31 Vict. c. 131, s. 35, as to personation in respect of shares or share warrants or coupons.

of felony and liable to penal servitude for life or not less than five years, or imprisonment with or without hard labour, or solitary confinement to the extent of two years (*i*).

V. *Obtaining property by false pretences.* This offence, which is closely allied to larceny, though distinguishable from it as being perpetrated through the medium of a mere *fraud*,—was a misdemeanor, at common law, punishable by fine and imprisonment. But statutable provisions have now been made on this subject, and under these (*k*), whoever shall, by any false pretence, obtain from another any chattel, money or valuable security, with intent to cheat or defraud any person of the same,—is guilty of a misdemeanor, and liable to penal servitude for five years (*l*); or he may be punished by imprisonment not exceeding two years, with or without hard labour and solitary confinement (*m*). There is also an enactment that if, upon the trial of any person indicted for such a misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to the felonious offence of *larceny*, he shall not by reason thereof be entitled to be acquitted on such indictment (*n*); and further,

(*i*) 37 & 38 Vict. c. 36.

(*k*) 24 & 25 Vict. c. 96, s. 88. As to a *false pretence*, see R. *v.* Crossley, 2 M. & Rob. 17; R. *v.* Ady, 7 Car. & P. 140; R. *v.* Asterley, ib. 191; R. *v.* Williams, ib. 354; R. *v.* Barnard, ib. 784; R. *v.* Masterton, 2 Cox's Cr. C. 100; Reg. *v.* Sherwood, 26 L. J. (M. C.) 81; The Queen *v.* Goss, 29 L. J. (M. C.) 86; *v.* Kilham, Law Rep., 1 C. C. R. 261; *v.* Ardley, ib. 301; *v.* Francis, ib. 2 C. C. R. 128. As to the term *valuable security*, see Reg. *v.* Greenhalgh, 1 Dearsley's C. C. R. 267; R. *v.* Danger, 5 W. R. (C. C. R.) 738. The provision applies, though the money, &c. be delivered to some person other than, but for the benefit of, the person making the false pretence. (Ib., and see sect. 89.)

(*l*) See 27 & 28 Vict. c. 47. It was held in The Queen *v.* Deane (Law Rep., 2 Q. B. D. 305) that if previously convicted of felony and so charged in the indictment, such offender could not be sentenced to penal servitude for less than seven years. But see now 42 & 43 Vict. c. 55.

(*m*) 24 & 25 Vict. c. 96, s. 88.

(*n*) 36 Geo. 3, c. 7. See The Queen *v.* Robinson, 28 L. J. (M. C.) 58.

that the penalties above specified shall attach to whomever shall, with intent to defraud or injure any person, by false pretence fraudulently cause or induce another to execute, make, accept, endorse or destroy the whole or part of any valuable security; or to write or affix his name or that of any other person or persons, or the seal of a corporation or society, upon any paper or parchment, in order that the same may be made or converted into a valuable security (*o*).

VI. *Fraudulent concealment of deeds, or falsification of pedigree.* By 22 & 23 Vict. c. 35, s. 24 (amended by 23 & 24 Vict. c. 38, s. 8), any seller or mortgagor of land, or of chattels real or personal, or choses in action conveyed or assigned to a purchaser or mortgagee—or the solicitor or agent of such seller or mortgagor,—who (with intent to defraud) shall cancel any settlement, deed, will, or other instrument material to the title, or conceal any incumbrance from the purchaser or mortgagee, or falsify any pedigree upon which the title depends, in order to induce such purchaser or mortgagee to accept the title,—shall be guilty of a misdemeanor punishable with fine or with imprisonment not exceeding two years, (with or without hard labour,) or by both. But no prosecution for this offence shall be commenced without the sanction of the attorney-general, (or, if that office be vacant, solicitor-general,) nor without previous notice to the person intended to be prosecuted.

VII. *Falsification of accounts.* By 24 & 25 Vict. c. 96, and 38 & 39 Vict. c. 24 (the Falsification of Accounts Act, 1875), if a clerk, officer or servant shall wilfully, and with intent to defraud, destroy, alter, mutilate or falsify a book, paper, writing, valuable security or account belonging to or in the possession of his employer, or which has been

(*o*) 24 & 25 Vict. c. 96, s. 90. This provision is framed upon 21 & 22 Vict. c. 47, repealed by 24 & 25 Vict. c. 95.

received into his custody for him; or with a similar intent shall make or concur in making a false entry, or omitting or altering any material particular therein, or in any document or account, he shall be guilty of a misdemeanor,—and be liable to penal servitude to the extent of seven years, or imprisonment with or without hard labour for not exceeding two years.

VIII. *Offences relating to the coin.* And, first, of offences relating to the coin *of this realm.* These are now comprised in the stat. 24 & 25 Vict. c. 99, (intituled "An Act to consolidate and amend the statute law of the United Kingdom against offences relating to the coin"); which statute repeals, as far as the united kingdom is concerned (*p*), the 2 & 3 Will. IV. c. 34, by which this subject was previously regulated; and which itself swept away a great variety of enactments relating to the coin, by which our criminal code was previously encumbered. The existing provisions are as follows:—

With respect to gold and silver coin.

1. Whoever shall falsely make or counterfeit any coin, resembling, or apparently intended to resemble or pass for, any of the current gold or silver coin of the realm, shall be guilty of felony (*q*).

2. Whoever shall gild or silver, (or colour with wash or materials capable of producing the colour of gold or silver, or by other means) a coin, resembling or intended to pass for some current gold or silver coin; or a piece of silver or copper, or of coarse gold or silver, or of some metal or mixture of metals (of a fit size and figure to be coined),—with intent that the same shall be coined into false coin, resembling, or intended to pass for some current

(*p*) In certain of the *colonies*, however, the 2 & 3 Will. 4, c. 34, remains still in force, its provisions having been, by 16 & 17 Vict. c. 48, extended to those colonies in which local provisions, with respect to offences relating to the coin of this realm, have not been made.

(*q*) 24 & 25 Vict. c. 99, s. 2.

gold or silver coin; or who shall gild, silver, or colour any current silver or copper coin (or file or alter the same), with intent to make it resemble or pass for any other current gold or silver coin,—shall, in any of the above cases, be guilty of felony (*r*).

3. Whoever, without lawful authority or excuse, (the proof whereof shall lie on the party accused,) shall buy, sell, receive, pay, or put off a false gold or silver coin, at a lower rate than the same by its denomination imports; or shall import into the united kingdom any such false coin, knowing the same to be counterfeit; he shall, in either case, be guilty of felony (*s*).

4. Whoever, without lawful authority or excuse, (the proof whereof shall lie on the party accused,) shall knowingly make or mend, or buy or sell, or have in his custody or possession, or shall convey out of the Royal Mints, any coining moulds, machines or tools,—or shall convey out of such Mints any coin, bullion, metal, or mixture of metals, —shall, in any of such cases, be guilty of felony (*t*).

The punishment for any of the above four felonious offences is penal servitude for life, or for any term not less than five years; or imprisonment for any term not more than two years, with or without hard labour and solitary confinement (*u*).

5. Whoever shall impair, diminish, or lighten current gold or silver coin, with intent that the coin so altered may pass for current gold or silver coin, shall be guilty of

(*r*) 24 & 25 Vict. c. 99, s. 3. See R. *v.* Turner, 2 M. C. C. R. 42.

(*s*) Sects. 6, 7. See R. *v.* Joyce, Car. C. L. 184.

(*t*) Sects. 24, 25. See R. *v.* Foster, 7 Car. & P. 495; R. *v.* Bannen, 1 Car. & Kir. 295; The Queen *v.* Harvey, Law Rep., 1 C. C. R. 284.

(*u*) Sects. 2, 6, 7, 24, 25; 27 & 28 Vict. c. 47. In the case of any felony under the 24 & 25 Vict. c. 99, the court may, if it shall think fit, bind over the offender with sureties to keep the peace, in addition to any other punishment (sect. 38). Until the passing of 2 Will. 4, c. 34, many offences connected with counterfeiting coin were *capital* felonies; and, in the time of Blackstone, to counterfeit the king's money, or bring false money into the realm, was *treason* (4 Bl. Com. p. 84).

felony; and he is liable to penal servitude for any term not less than five years, nor more than fourteen years, or he may be imprisoned as already specified (*x*).

6. Whoever shall unlawfully and knowingly have in his custody or possession filings, clippings, bullion dust or solution, produced or obtained by impairing, diminishing or lightening the current gold or silver coin, shall be guilty of felony, and punished by imprisonment as already specified, or by penal servitude for not less than five nor more than seven years (*y*).

7. Whoever shall tender, utter, or put off a false or counterfeit gold or silver coin, knowing the same to be false or counterfeit, shall be guilty of a misdemeanor; and may be imprisoned for any term not exceeding one year, with or without hard labour and solitary confinement (*z*): and if at the time of such uttering he shall have in his possession any other such counterfeit coin; or shall either on the day of such uttering, or within ten days afterwards, utter any more such false coins (knowing the same to be false);—the imprisonment may be for any term not exceeding two years (*a*): and if any person shall have in his possession three or more pieces of such counterfeit gold or silver coin, knowing the same to be counterfeit, and with intent to utter the same, he may be sentenced to penal servitude for five years, or imprisonment not exceeding two years (*b*). And upon a second conviction for any of these misdemeanors he shall be deemed guilty of felony,

(*x*) 24 & 25 Vict. c. 99, s. 4; 27 & 28 Vict. c. 47.

(*y*) 24 & 25 Vict. c. 99, s. 5; 27 & 28 Vict. c. 47.

(*z*) 24 & 25 Vict. c. 99, s. 9. In the case of any indictable misdemeanor under this Act, the court, in addition to, or in lieu of, any other punishment, may fine the offender, and bind him over with sureties to keep the peace and for good behaviour (sect. 38).

(*a*) Sect. 10.

(*b*) Sect. 11. (See 27 & 28 Vict. c. 47.) As to the offence of uttering, &c. counterfeit coin, see R. *v.* Heath, R. & R. C. C. 184; R. *v.* Stewart, ib. 288; R. *v.* Williams, 1 Car. & M. 259; R. *v.* Hurse, 2 M. & R. 360; R. *v.* Rogers, 2 Moo. C. C. 85; R. *v.* Foster, 1 Dearsley's C. C. R. 456; Jarvis's case, ib. 552; The Queen *v.* Martin, Law Rep., 1 C. C. R. 214.

and may be punished by penal servitude for life, or not less than five years; though a discretionary power is here also reserved to the court, to substitute imprisonment to the extent and manner already specified (*c*).

8. And whoever shall, with intent to defraud, tender, utter or put off, as for current gold or silver coin, some coin not being such current coin, or any medal or piece of metal resembling the current coin for which the same shall be tendered, being of less value than the same,—shall be guilty of a misdemeanor, punishable with imprisonment, with or without hard labour and solitary confinement, to the extent of one year (*d*).

With respect to copper coin (*e*).

1. If any person shall falsely make or counterfeit a coin resembling any current copper coin; or shall, (without lawful authority or excuse,) make or mend, or begin to make or mend, buy or sell, or have in his custody or possession, any instrument, tool or engine adapted for counterfeiting the current copper coin; or shall buy, receive, pay, or put off a false coin resembling any current copper coin, at a lower rate than its denomination imports, or was apparently intended to import;—he shall, in any of these cases, be guilty of felony; and may be sentenced to penal servitude for any term not more than seven nor less than five years, or be imprisoned for any term not more than two years, with or without hard labour and solitary confinement (*f*).

2. Whoever shall utter or put off a false coin intended to pass for some current copper coin; or shall have in his possession three or more pieces of false copper coin; knowing the same to be counterfeit, and with intent to utter the same,—shall be guilty of a misdemeanor, and

(*c*) 24 & 25 Vict. c. 99, s. 12; 27 & 28 Vict. c. 47.

(*d*) 24 & 25 Vict. c. 99, s. 13.

(*e*) The provisions mentioned in the text with regard to copper equally apply to the coins now in use, which are in fact composed of *bronze* or *mixed metal*. (See 24 & 25 Vict. c. 99, s. 1.)

(*f*) 24 & 25 Vict. c. 99, s. 14; 27 & 28 Vict. c. 47.

may be so imprisoned for any term not exceeding one year (*g*).

In addition to the above provisions, it is also enacted, that it shall be a misdemeanor, punishable by imprisonment, with or without hard labour, to the extent of two years, for a person (without lawful authority) to *export* any false or counterfeit coin (*h*); and a misdemeanor so punishable to the extent of one year, to *deface* the current coin of this realm by stamping thereon names or words, whether such coin shall or shall not be thereby diminished or lightened. And it is declared that coin, so defaced or stamped, shall not be a legal tender; and that any person tendering or uttering it, may be summarily convicted before two justices, and fined forty shillings (*i*).

There are, also, provisions having reference to the *coin of foreign states.*

Whoever shall make or counterfeit any kind of coin not the current gold or silver of this country, but resembling or apparently intended to resemble or pass for gold or silver coin of some foreign state; or who shall (without lawful authority or excuse) bring into the united kingdom any such false coin, knowing the same to be counterfeit;—shall be guilty of felony: and he may be sentenced to penal servitude for a term not more than seven nor less than five years; or imprisonment, with or without hard labour and solitary confinement, to the extent of two years (*k*). And it is further enacted, that if any one shall tender,

(*g*) 24 & 25 Vict. c. 99, s. 15.

(*h*) Sect. 8.

(*i*) Sects. 16, 17. To melt down the current gold and silver coin of the realm; to receive current gold coin as being of more or less value than was denoted by its denomination; and to import into this country silver coin below the standard weight—were all formerly offences. But the statutes under which such practices were made penal, were repealed by 59 Geo. 3, c. 49, s. 11; 6 Geo. 4, c. 105, s. 141; and 2 & 3 Will. 4, c. 34.

(*k*) 24 & 25 Vict. c. 99, ss. 18, 19. (See 27 & 28 Vict. c. 47.) These provisions are in the place of similar ones contained in 37 Geo. 3, c. 126 (repealed by 24 & 25 Vict. c. 95); as to which see R. *v.* Roberts, 1 Dearsley's C. C. 339.

utter or put off, such counterfeit foreign coin, knowing the same to be false, he shall be guilty of a misdemeanor, and may for the first offence be imprisoned to the extent of six months (with or without hard labour); for the second offence be imprisoned for two years (with the addition, if thought fit, of solitary confinement); and for the third offence, shall be deemed guilty of felony, and may then be sentenced to penal servitude for life, or not less than five years, with the alternative sentence of imprisonment for not more than two years, with or without hard labour and solitary confinement (*l*).

And, again, whoever shall counterfeit a foreign coin, intended to resemble some foreign *copper* or other coin made of metals or mixed metals of less value than silver,—shall be guilty of a misdemeanor; and may be imprisoned for the first offence for any time not exceeding one year: and on a second conviction, he is liable to penal servitude for not more than seven nor less than five years; or imprisonment, (with or without hard labour and solitary confinement,) not exceeding two years (*m*). And whoever shall have in his possession more than five pieces of *any* false foreign coin (without lawful excuse) may be convicted before a justice in the penalty of not more than forty nor less than ten shillings, in respect of every piece of such false coin so found in his possession; and in default of payment thereof may be committed to prison for three months, or till the fine be paid. And all such base money becomes forfeited, and shall be destroyed by the authorities (*n*).

IX. *Fraudulent Debtors.* Those fraudulent practices affecting the rights of property which are provided against by the law of Bankruptcy may here be referred to. Of the nature of these, however, we have taken such note as

(*l*) 24 & 25 Vict. c. 99, ss. 20, 21; 27 & 28 Vict. c. 47.

(*m*) 24 & 25 Vict. c. 99, s. 22; 27 & 28 Vict. c. 47.

(*n*) 24 & 25 Vict. c. 99, s. 23.

seemed proper in a former part of the work when that branch of the law engaged our attention, and it will be unnecessary to recapitulate them in this place (*o*).

X. *Cheating.* We may also allude to the practice of criminal cheating in trade generally, and refer here to that prodigious multitude of statutes, which are made to restrain and punish deceits in particular businesses, and which are enumerated by Hawkins and Burn, and other writers (*p*). Moreover the offence of selling articles, knowing any trade marks thereon to be counterfeited, is reducible to this head of cheating (*q*); as is likewise, in a peculiar manner, the offence of *selling by false weights and measures*, the standard of which has already fallen under our consideration (*r*). The general punishment for all cheating such as is indictable at common law (*s*), is by fine and imprisonment (*t*); to which, by 14 & 15 Vict. c. 100, s. 29, hard labour may now be added; but if the cheating

(*o*) Vide sup. vol. II. pp. 158, 160.

(*p*) By 19 & 20 Vict. c. 114, provisions are made "to prevent false packing and other frauds in the *hay and straw* trade," which trade is regulated by 36 Geo. 3, c. 88. We may also notice here, that Blackstone (vol. iv. p. 157) mentions the offence of *breaking the assize of bread*,—that is, violating the rules laid down by several statutes for regulation of its price, viz., 51 Hen. 3, st. 1 and 6; ord. pistor. 2 & 3 Edw. 6, c. 15; 31 Geo. 2, c. 29. But all statutes relating to the assize were repealed by 6 & 7 Will. 4, c. 37, and (as to the city of London) by 3 Geo. 4, c. cvi., —which contain new regulations as to the bread trade. It may be observed, as connected with enactments more or less devised in the interest of fair dealing, that by 34 & 35 Vict. c. 96, *pedlars* (who sell their wares by travelling about from place to place) are required to take out certificates before they can exercise their calling, and that these must be annually renewed.

(*q*) Vide sup. p. 150. The penalty imposed for this species of cheating, is the forfeiture of the value of the articles, and an additional sum to the extent of 5*l.* (25 & 26 Vict. c. 88, s. 4.)

(*r*) Vide sup. vol. II. p. 520.

(*s*) As to what cheating in *matters of trade* is indictable or otherwise at the common law, see Rex *v.* Wheatley, 2 Burr. 1128; Rex *v.* Dixon, 3 M. & S. 11; Rex *v.* Haynes, 4 M. & S. 214; 2 Russ. on Crimes, bk. iv. c. 31, s. 1.

(*t*) See R. *v.* Treve, 2 East, P. C. 821; R. *v.* Dixon, ubi sup.; R. *v.* Haynes, ubi sup.

be in contravention of some special enactment, the easier and more usual way is to proceed by way of summary conviction; and then to levy, by way of distress and sale, the forfeiture or penalty imposed by the particular Act of parliament (*u*).

(*u*) We may take occasion here to mention certain offences spoken of by Blackstone, but which are no longer (as they were in his time) prohibited by statute. These are, 1. *To transport and seduce our artists to settle abroad, or even to export tools or utensils used in certain manufactures.* But as to this, see now 5 Geo. 4, c. 97, and 6 & 7 Will. 4, c. 52. 2. *To forestall, regrate, or engross the market*, as to which see now 7 & 8 Vict. c. 24. The offence of *forestalling* the market, consisted in buying the merchandize on its way to market, or dissuading persons to bring their goods there, or persuading them to enhance the price when there. That of *regrating*, consisted in buying corn, &c. in any market, and selling it again in or near the same place. That of *engrossing*, was getting into one's possession or buying up large quantities of corn, &c., with intent to sell them again. 3. The offence of *owling*, that is of transporting wool or sheep out of the kingdom; but this (with all other offences relating to the exportation of wool or sheep,) was abolished by the effect of 5 Geo. 4, c. 47.

CHAPTER VI.

OF OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.

THE order of our distribution will next lead us to take into consideration, such crimes and misdemeanors as affect men, not in their capacity of individuals, or in respect of their persons or property, but as members of the commonwealth; in respect, in short, of those *public* rights which are common to all the subjects of the realm (*a*). And these shall be considered in this and the succeeding chapters under the following arrangement, viz. offences against public order, internal and external; offences against religion, morals and public convenience; and offences affecting the administration of justice and the maintenance of public order. Under the first of these heads we shall primarily advert to the crime of high treason.

I. [Treason, *proditio*, in its very name, imports a betraying, treachery, or breach of faith; and the crime of which we here speak, is treachery against the sovereign or liege lord (*b*): and as it is the highest crime which,

(*a*) Vide sup. p. 45.

(*b*) "It therefore happens only "between allies," (saith the Mirrour, c. 1, s. 7,) "for treason is in- "deed a general appellation made "use of by the law to denote not "only offences against the king and "government: but also that accu- "mulation of guilt which arises "whenever a superior reposes a "confidence in a subject or inferior, "between whom and himself there "exists a natural, civil, or even "a spiritual relation; and the in- "ferior so abuses that confidence, "so forgets the obligations of duty, "subjection, and allegiance, as to "destroy the life of any such supe- "rior or lord. This is looked upon "as proceeding from the same "principle of treachery in private "life, as would have urged him "who harbours it to have con- "spired in public against his liege "lord and sovereign. And there- "fore for a wife to kill her lord or "husband, a servant his lord or "master, and an ecclesiastic his

[considered as a member of the community, any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of treason be indeterminate, this alone, (says the president Montesquieu,) is sufficient to make any government degenerate into arbitrary power (*c*). And yet, by the antient common law, there was a great latitude left in the breast of the judges to determine what was treason or not so, whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason which never were suspected to be such. Thus in the twenty-first year of Edward the third it was held to be treason, by *accroaching* or attempting to exercise royal power (a very uncertain charge), in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l.*; a crime, it must be owned, well deserving of punishment, but which seems to be of a complexion very different from that of treason (*d*). Killing the king's father or brother, or even his messenger, has also fallen under the same denomination (*e*): the latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius; which determined that any attempts or designs against the ministers of the prince should be treason (*f*). But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. st. 5, c. 2, was made, which defined what offences only, for the future,

"lord or ordinary; these, being "breaches of the lower allegiance "of private and domestic faith, "are denominated *petit* treasons. "But when disloyalty so rears its "crest as to attack even majesty it- "self, it is usually called, by way of "eminent distinction, *high* treason, "being equivalent to the *crimen* "*læsæ majestatis* of the Romans." 4 Bl. Com. 75. Since the time of Blackstone, however, the offence of *petit* treason has been abolished (9 Geo. 4, c. 31, s. 2).

(*c*) Sp. L. b. xii. c. 7.

(*d*) 1 Hale, P. C. 80.

(*e*) Britt. c. 22; Hawk. P. C. b. 1, c. 17, s. 1.

(*f*) Cod. 9, 8, 5.

[should be held to be treason; in like manner as the *lex Julia majestatis* among the Romans, promulged by Augustus Cæsar, comprehended all the antient laws that had before been enacted to punish transgressors against the State (*g*). We shall find that, under this statute of Edw. III., the crime of high treason consists of five distinct branches (*h*).

1. "When a man doth compass or imagine the death "of our lord the king, of our lady his queen, or of their "eldest son and heir." Under this description, a queen *regnant* is within the words of the Act, for she is invested with royal power, and is as much entitled to the allegiance of her subjects as if she had been a king (*i*); but the husband of such a queen is not comprised within these words, and therefore no treason can be committed against him (*k*). The king here intended is the king in possession, without any respect to his title; for it is held that a king *de facto*, and not *de jure*,—or, in other words, an usurper that hath got possession of the throne,—is a king within the meaning of the statute; as there is a temporary allegiance due to him for his administration of the government and temporary protection of the public. And therefore treasons committed against Henry the sixth were punished under Edward the fourth, though all the line of Lancaster had been previously declared usurpers by act of parliament. On the other hand, the most rightful heir of the crown, (or king *de jure*, and not *de facto*,) who hath never had plenary possession of the throne,—as was

(*g*) Gravin. Orig. 1, s. 34.

(*h*) Blackstone (vol. iv. p. 83) notices two additional species of high treason under the statute of Edward the third, viz., 1, "counter-"feiting the king's great or privy "seal;" and 2, "counterfeiting the "king's money, and bringing false "money into the realm, counterfeit "to the money of England, know-"ing the same to be false, to mer-"chandize and make payment "withall." But as to the first of these, though the crime remained a treason under 11 Geo. 4 & 1 Will. 4, c. 66, it is now, by 24 & 25 Vict. c. 98, reduced to an ordinary felony (vide sup. p. 148); and the second ranks now, merely as the offence of coining; as to which, vide sup. p. 154.

(*i*) 1 Hale, P. C. 101; see R. v. Oxford, 9 Car. & P. 525.

(*k*) 3 Inst. 7; 1 Hale, P. C. 106.

[the case of the house of York, during the three reigns of the line of Lancaster,—is not a king, within this statute, against whom treasons may be committed (*l*). And a very sensible writer on the Crown law carries the point of possession so far, that he holds that a king out of possession, is so far from having right to our allegiance by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him: a doctrine which he grounds upon the statute 11 Hen. VII. c. 1; which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a king *de facto* (*m*). But in truth this seems to be confounding all notions of right and wrong: and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power, though not the name of king, the people were bound in duty to hinder the son's restoration; and that were any foreign prince to invade this kingdom, and by any means to get possession of the Crown—a term, by the way, of very loose and indistinct signification—the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry the seventh does by no means *command* any opposition to a king *de jure*, but *excuses* the obedience paid to a king *de facto*. When therefore an usurper is in possession, the subject is *excused* and *justified* in obeying and giving him assistance; otherwise, under an usurpation, no man could be safe, if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, further, as the mass of people are imperfect judges of title, (of which, in all cases, possession is *primâ facie* evidence,) the law compels no man to yield obedience to that prince whose right is, by want of possession, rendered uncertain and disputable, till Providence

(*l*) 3 Inst. 7; 1 Hale, P. C. 104. (*m*) See Hawk. P. C. b. 1, c. 17, s. 16.

[shall think fit to interpose in his favour, and decide the ambiguous claim; and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is, (according to Sir M. Hale,) no longer the object of treason (*n*). And the same reason holds in case the king abdicates the government, or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution; since, as was formerly observed, when the fact of abdication is once established and determined by the proper judges, the consequence necessarily follows that the throne is thereby vacant, and he is no longer king (*o*).

Let us next see what is a *compassing* or *imagining* the death of the king, &c. These are synonymous terms; the word *compass* signifying the purpose or design of the mind or will (*p*); and not, as in common speech, the carrying such design into effect (*q*); and, therefore, an accidental stroke, which may mortally wound the sovereign *per infortunium*, without any traitorous intent, is no treason. As was the case of Sir Walter Tyrrel; who by the command of King William Rufus, shooting at a hart, the arrow glanced against a tree and killed the king upon the spot (*r*). But as this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open or *overt* act. And yet the tyrant Dionysius is recorded to have executed a subject barely for dreaming that he had killed him; which was held for sufficient proof, that he had thought thereof in his waking hours (*s*).

But such is not the temper of the English law; and therefore it is necessary that there shall appear an open or

(*n*) 1 Hale, P. C. 104.

(*o*) Vide sup. vol. II. p. 437.

(*p*) By the antient law the *compassing* or intending the death of any man, if demonstrated by some evident fact, was equally penal as homicide itself. (3 Inst. 5.)

(*q*) 1 Hale, P. C. 107.

(*r*) 3 Inst. 6.

(*s*) Plutarch *in vit. Dionysii.*

[overt act of a more full and explicit nature, to convict the traitor upon (*t*). The statute expressly requires that the accused "be thereof, upon sufficient proof, attainted of 'some open act' by men of his own condition." Thus to provide weapons or ammunition for the purpose of killing the king, is held to be a palpable overt act of treason in imagining his death (*u*).

To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king's death (*x*). For all force, used to the person of the king, in its consequence may tend to his death; and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question, also, but that taking any measures to render such treasonable purposes effectual,—as assembling and consulting on the means to kill the king,—is a sufficient overt act of treason (*y*).

How far mere *words* spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, was formerly matter of doubt (*z*).

(*t*) By 7 & 8 Will. 3, c. 3, s. 8, it is provided, "that no evidence shall "be admitted or given of any overt "act that is not expressly laid in "the indictment, against any per-"son or persons whatsoever."

(*u*) 3 Inst. 12.

(*x*) 1 Hale, P. C. 109.

(*y*) See Fost. 194, 195.

(*z*) With regard to seditious words, the Report of the Criminal Code Bill Commission (p. 20) has these remarks: "On this very delicate "subject we do not undertake "to suggest any alteration of the "law. It is not easy to find ex-"plicit authority earlier than the "case of R. *v.* Frost (22 St. Tr. "471, tried before Lord Kenyon in "1793), for the proposition that to "speak seditious words is an in-"dictable offence. A passage in "the 3rd Institute (p. 14) cer-"tainly says, 'But words without "'an overt deed are to be punished "'in another degree as an high mis-"'prison.' This, however, is an "incidental remark at the end of a "passage, the main point of which "is that mere words are not in "general an overt act of treason." In reference to this class of offences the Commissioners in another place cite the following cases: O'Connell *v.* R., 11 Cl. & F. 155, 234; R. *v.* Lambert and Perry, 2 Camp. 398; R. *v.* Vincent, 9 C. & P. 91.

[And we have two instances in the reign of Edward the fourth, of persons executed for treasonable words,—the one a citizen of London, who said he would make his son heir of the *crown*, such being the sign of the house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly (*z*). But these were even then esteemed hard cases: Chief Justice Markham choosing rather to leave his place, than assent to the latter judgment (*a*). And now it seems clearly to be agreed, that, by the common law and the statute of Edward the third, words spoken, however atrocious in their nature, amount only to a high misdemeanor. For they may be spoken in heat, without any intention; or be mistaken, perverted or mis-remembered by the hearers; their meaning depends always on their connexion with other words and things; they may signify differently, even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As, therefore, there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to treason; and accordingly in the fourth year of Charles the first, on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king, "that though the "words were as wicked as might be, yet there was no "treason: for, unless it be by some particular statute, no "words will be treason" (*b*). If indeed, the words be set down in writing, it argues more deliberate intention; and

(*z*) 1 Hale, P. C. 115; 4 Bl. Com. p. 80. The cases here referred to by Blackstone, are those of William Walker and of Sir Thomas Burdet. But it is said in Stow's Chron. p. 415, that the charge against Walker was for words spoken against the title of the king when he was proclaimed; and it appears from Cro. Car. p. 121, that the charge against Burdet was of having conspired to kill the king and prince by casting their nativity, foretelling their speedy death, and scattering papers containing the prophecy amongst the people.—See Foss's Judges of England, vol. iv. pp. 414—416.

(*a*) Hale, ubi sup.

(*b*) Pyne's case, Cro. Car. 117; Williams's case, ib. 126.

[it has been held that writing is, in itself, an overt act of treason, for *scribere est agere*. But even in this case, the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason: particularly in the cases of one Peachum, a clergyman, for treasonable passages in a sermon never preached (*c*); and of Algernon Sidney, for some papers found in his closet; which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt acts of that treason, which was specially laid in the indictment (*d*). But being merely speculative, without any intention, so far as appeared, of making any public use of them, the convicting the authors upon such an insufficient foundation has been universally disapproved. Peachum was therefore pardoned; and though Sidney indeed was executed, yet it was to the general discontent of the nation, and his attainder was afterwards reversed by parliament. There was then no manner of doubt but that the publication of such a treasonable writing, was a sufficient overt act of treason at the common law; though in later times even that has been questioned (*e*).

2. The second species of high treason is, "If a man "do violate the king's companion, or the king's eldest "daughter unmarried, or the wife of the king's eldest "son and heir." By the king's companion, is meant his wife; and by violation is understood carnal knowledge, as well without force as with it. And this is treason in both parties, if both be consenting, as some of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious; and therefore when this reason ceases, the law ceases with it; for to

(*c*) Williams's case, Cro. Car. 126.
(*d*) Foster, 198.
(*e*) Sec 1 Hale, P. C. 118; Hawk. P. C. b. 1, c. 17, s. 32.

[violate a queen (or princess) dowager is held to be no treason (*f*). In like manner as, by the feudal law, it was a felony and attended with a forfeiture of the fief, if the vassal vitiated the wife, or daughter of his lord (*g*); but not so, if he only vitiated his widow (*h*).

3. The third species of high treason is, "If a man do "levy war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws (*i*), or to remove evil councillors, or other grievances, whether real or pretended (*k*). For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power for these purposes in the high court of parliament. Neither does the constitution justify any private or particular resistance, for private or particular grievances; though, in cases of national oppression, the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces, by defending a castle against them, is a levying of war; and so is an insurrection with an avowed design to pull down *all* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority (*l*). But a tumult with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this being no general

(*f*) 3 Inst. 9. The instances specified in 25 Edw. 3, st. 5, c. 2, however, do not prove much consistency in the application of this reason; for there is no protection given to the wives of the younger sons of the king; though their issue must inherit the crown before the issues of the king's eldest daughter: and her chastity is only inviolable before marriage, whilst her children would be clearly illegitimate. Before the twenty-fifth year of Edward the third, it was held to be treason not only to violate the wife and daughter of the king, but also the nurses of his children, *les norices de lour enfans*. (Christian's Blackstone.)

(*g*) Feud. l. 1, t. 5.

(*h*) Ibid.

(*i*) Doug. 590.

(*k*) Hawk. P. C. b. 1, c. 17, s. 25.

(*l*) 1 Hale, P. C. 132.

[defiance of public government. So, if two subjects quarrel and levy war against each other,—in that spirit of private war which prevailed over all Europe in the early feudal times,—it is only a great riot and contempt, and no treason (*m*). Thus it happened between the Earls of Hereford and Gloucester, in the twentieth year of Edward the first; who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no treason, but only a great misdemeanor (*n*). A bare conspiracy to levy war, does not amount to this species of treason; but if particularly pointed at the person of the king or his government, it falls within the first species,—viz., of compassing or imagining the king's death (*o*).

4. "If a man be adherent to the king's enemies in his "realm, giving to them aid and comfort in the realm or "elsewhere," he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence (*p*); by sending them provisions; by selling them arms; by treacherously surrendering them a fortress, or the like (*q*). By enemies, are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the Crown of Great Britain,—the giving them assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom, or else in that of levying war against his majesty (*r*). And, most indisputably, the same acts of adherence or aid, which

(*m*) See Robertson, Chas. V., vol. i. 45, 286.

(*n*) 1 Hale, P. C. 136.

(*o*) 3 Inst. 9; Foster, 211, 213. See as to this the Report of the Criminal Code Bill Commission, p. 19.

(*p*) Dr. Hensy's case, 1 Burr. 650; R. *v.* Stone, 6 T. R. 527.

(*q*) 3 Inst. 10.

(*r*) Foster, 219.

[when applied to foreign enemies, will constitute treason under this branch of the statute, will, when afforded to our own fellow-subjects in actual rebellion at home, amount to the same crime, under the description of levying war against the king (*t*). But to relieve a rebel, fled out of the kingdom, is no treason; for the statute is taken strictly, and a rebel is not an *enemy;* an enemy being always the subject of some foreign prince, and one who owes no allegiance to the Crown of England (*u*). And, if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a safe opportunity.

5. The last species of high treason under this statute is, "If a man slay the chancellor, treasurer, or the king's justices "of the one bench or the other, justices in eyre or justices "in assize, and all other justices assigned to hear and de-"termine, being in their places doing their offices." These high magistrates, as they represent the king's majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not to wounding or a bare attempt to kill them. It extends also only to the officers therein specified; and therefore the barons of the Exchequer, as such, were not, it has been said, within the protection of this Act; but the lord keeper, or commissioners, of the Great Seal, seem to be within it,—by virtue of the statutes 5 Eliz. c. 18, and 1 Will. & Mary, c. 21 (*x*).

Thus careful was the legislature in the reign of Edward the third, to specify and reduce to a certainty the vague

(*t*) Foster, 216.

(*u*) Hawk. P. C. b. 1, c. 17, s. 28.

(*x*) 1 Hale, P. C. 231. In reference to this species of treason, it is pointed out by the Report of the Criminal Code Bill Commission (p. 19) that the Lord Chancellor and other judges are sufficiently protected in the discharge of their duties by the ordinary law as to murder.

[notions of treason that had formerly prevailed in our courts. But the Act does not stop here, but goes on as follows: "Because other like cases of treason may happen in time "to come, which cannot be thought of or declared at pre- "sent, it is accorded, that if any other case supposed to "be treason, which is not above specified, doth happen "before any judge, the judge shall tarry without going "to judgment of the treason, till the cause be showed and "declared before the king and his parliament, whether it "ought to be judged treason or other felony." Sir M. Hale is very high in his encomiums on the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this Act, by not suffering them to run out upon their own opinions into constructive treasons, though in cases that seem to them to have a like parity of reason; but reserving them to the decision of parliament (*y*). This is a great security to the public, the judges, and even this sacred Act itself; and leaves a weighty *memento* to judges to be careful, and not over-hasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled. Sir M. Hale also observes, that as the authoritative decision of these *casus omissi* is reserved to the king and parliament, the most regular way to do it is by a new declarative act; and therefore the opinion of any one or of both houses, (though of very respectable weight,) is not that solemn declaration referred to by this Act, as the only criterion for judging of future treasons (*z*).

In consequence of this power,—not indeed originally granted by the statute of Edward the third, but constitutionally inherent in every subsequent parliament, which cannot be abridged of any rights by the act of a precedent one,—the legislature was extremely liberal in declaring new treasons in the unfortunate reign of King Richard the second: as, particularly, the killing of an ambassador

(*y*) 1 Hale, P. C. 259. (*z*) Ibid.

[was made so. Which seems to be founded upon better reason than the multitude of other points that were then strained up to this high offence; the most arbitrary and absurd of all which was by the statute 21 Rich. II. c. 3,—which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And in the very first year of his successor's reign an Act was passed, reciting "that no man knew how he ought to behave "himself, to do, speak or say, for doubt of such pains of "treason; and therefore it was accorded, that in no time "to come any treason be judged, otherwise than was or-"dained by the statutes of King Edward the third" (*a*). This at once swept away the whole load of extravagant treasons, introduced in the time of Richard the second.

But afterwards, between the reign of Henry the fourth and Queen Mary, and particularly in the bloody reign of Henry the eighth, the spirit of inventing new and strange treasons was revived. Among which, we may reckon the offences of clipping money; breaking prison or rescue when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; wilful poisoning; execrations against the king, calling him opprobrious names by public writing; refusing to abjure the pope; deflowering, or marrying without the royal licence, any of the king's children, sisters, aunts, nephews or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing*, (manifested by an overt act,) the king to have been lawfully married to Anne of Cleves; derogating from the king's royal style and

(*a*) Stat. 1 Hen. 4, c. 10.

[title, impugning his supremacy, and assembling riotously to the number of twelve, and not dispersing upon proclamation. All which new-fangled treasons were totally abrogated by the statute 1 Edward VI. c. 12, (confirmed by statute 1 Mary, sess. 1), which once more reduced all treasons to the standard of the statute of the twenty-fifth year of Edward the third. But since the reign of Mary, addition has again been made to the number of treasonable offences created by act of parliament. For by statute 1 Anne, st. 2, c. 21, s. 3, if any person shall endeavour to deprive or hinder any person, being the next in succession to the Crown according to the limitations of the Act of Settlement, from succeeding to the Crown, and shall maliciously and directly attempt the same by any overt act,—such offence shall be high treason. By statute 6 Anne, c. 7, if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm that any other person hath any right or title to the Crown of this realm, otherwise than according to the Act of Settlement; or that the kings of this realm, with the authority of parliament, are not able to make laws and statutes to bind the Crown and the descent thereof,—such person shall be guilty of high treason. This offence, (or indeed maintaining this doctrine in anywise, that the king and parliament cannot limit the Crown,) was once before made treason by statute 13 Eliz. c. 1, during the life of that princess. And after her decease, it continued a high misdemeanor, and punishable only with forfeiture of goods and chattels, even in that most flourishing era of indefeasible hereditary right and *jure divino* succession. But it was again raised into treason, by the statute of Anne above mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed, in 1719, for printing a treasonable pamphlet, entitled, *Vox populi vox Dei* (*b*).] Lastly, by 36 Geo. III.

(*b*) State Tr. ix. 680.

c. 7 (*c*), if any person shall, either within the realm or without, compass, imagine or intend death, destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment, or restraint of the person of the king, his heirs and successors; and shall express, utter or declare such intention by publishing any printing or writing, or by any overt act,—he shall be adjudged a traitor.

[Thus much for the crime of high treason, or *læsæ majestatis*, in all its branches (*d*); which, it will be observed, consists, originally, in grossly counteracting that allegiance which is due from the subject by either birth or residence; though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them to depart a little from this primitive idea. It is now, however, time to pass on from defining the crime, to describing its punishment.]

The offence of treason is, (by exception from the general rule of the crown law,) subject to limitation in respect of time. For by 7 & 8 Will. III. c. 3, no person shall be prosecuted for high treason, but within three years after the commission of the offence; except only in the case of a designed assassination of the sovereign, by poison or otherwise.

Until recently, the punishment of high treason, appointed by law, was more terrible than those inflicted for the crime of murder itself. For the sentence ran—1. That

(*c*) The 36 Geo. 3, c. 7 (which was at first temporary only), was made perpetual by 57 Geo. 3, c. 6; and it having been doubted whether it extended to Ireland, it was expressly extended to that country by 11 & 12 Vict. c. 12.

(*d*) Besides the above treasons, Blackstone (vol. iv. pp. 88 et seq.) mentions many others created since the reign of Mary, which he divides into—1st, such as relate to Papists; 2nd, such as relate to falsifying the coin or other royal signatures; and 3rd, those created for the security of the Protestant succession in the house of Hanover. But the statutes of the two first classes, have been repealed by the 7 & 8 Vict. c. 102, and 2 & 3 Will. 4, c. 34; and those of the third, (with the exception of such as are noticed in the text,) have lost their importance by the extinction of the line of the Pretender, against whom their provisions were directed.

the offender be drawn on a hurdle to the place of execution. 2. That he be hanged by the neck, until he be dead. 3. That his head be severed from the body. 4. That his body be divided into four quarters. 5. That his head and quarters shall be at the disposal of the Crown. But the sovereign, after sentence, by warrant under his sign-manual counter-signed by a principal secretary of state, might change the whole sentence into beheading, or even remit the capital punishment altogether: and the sentence upon women, (the decency due to whose sex forbade the exposing and publicly mangling their bodies,) was, only that they were to be drawn to the place of execution, and hanged by the neck until they were dead (*f*). And now by the Felony Act, 1870 (33 & 34 Vict. c. 23), s. 31, the only portion of the sentence previously in use which is retained for the future, is that part which directs that the traitor shall be hanged by the neck till he be dead.

We proceed next to consider certain offences which, though they fall short of treason, are, like it, injurious to the person, prerogative, or government of the sovereign. As—

II. *Misprision* of treason.

[Misprisions, a term derived from the old French *mespris*, a neglect or contempt, are, in the acceptation of our law, generally understood to be all such high offences as rank not amongst such as are or were capital, but are closely

(*f*) In Blackstone's time (see vol. iv. p. 92), the sentence on a traitor was still more dreadful; for as the law then stood (in addition to the solemnities mentioned in the text), the traitor, if a male, was, 1st, to be drawn on a sledge or hurdle to the gallows; 2nd, to be hanged by the neck, and then cut down alive; 3rdly, his entrails were to be taken out and burned while he was yet alive. And if a woman, she was to be drawn to the gallows, and there burned alive. But the sentence was altered to the form in which it is stated above, by 30 Geo. 3, c. 48, s. 1, and 54 Geo. 3, c. 146. Also the abolished incidents of attainder, forfeiture and corruption of blood formerly attached to the crime of treason, as well as to some other crimes.

[bordering thereon: and it is said that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only (*g*). And upon the same principle, while the jurisdiction of the Star Chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court merely for a high misdemeanor: as happened in the case of Roger, Earl of Rutland, in the forty-third year of Elizabeth, who was concerned in the Earl of Essex's rebellion (*h*). Misprisions are generally divided in our books into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done. The latter, however, are not denominated in common language as misprisions, but rather as *contempts* or *high misdemeanors* (*i*). Misprision of treason consists of the bare knowledge and concealment of treason, without any degree of assent thereto, for any assent makes the party a principal traitor: as indeed the concealment, which was construed aiding and abetting, did at the common law. But it is now enacted by the statute 1 & 2 P. & M. c. 10, that a bare concealment of treason shall be only held a misprision.

This concealment becomes criminal if the party apprised of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace (*k*). But if there be any probable circumstances of assent,—as if one goes to a treasonable meeting, knowing beforehand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of, but conceals it:—this is an im-

(*g*) Year Book, 2 Rich. 3, 10; Staundf. P. C. 37; Kel. 71; 1 Hale, P. C. 374; Hawk. P. C. b. 1, c. 20.

(*h*) Hudson, of the Court of Star Chamber, MS. in Mus. Brit.; Collectanea Juridica, vol. ii. p. 1—241.

(*i*) 4 Bl. Com. 121.

(*k*) 1 Hale, P. C. 372.

[plied assent in law, and makes the concealer guilty of actual treason (*l*).

The punishment of misprision of treason is stated in the books to be the loss of the profit of the lands of the offender during life, forfeiture of his goods, and imprisonment during life; which total forfeiture of the goods was originally inflicted while the offence amounted to principal treason, and, of course, included in it a felony by the common law (*m*).] But no conviction for treason or felony now causes any forfeiture (*n*).

III. A third offence closely connected with that of high treason itself, is one provided against by 5 & 6 Vict. c. 51. It is that of a person who shall wilfully discharge, point, aim or present at the person of the Queen, any gun or other arms, whether containing explosive materials or not; or who shall strike at or attempt to throw any thing upon the Queen's person; or who shall produce any fire-arms or other arms, or any explosive or dangerous matter, near her majesty's person;—with intent, in any of these cases, either to injure or alarm her, or merely to commit a breach of the peace. And any one so offending is guilty of a high misdemeanor: and is made liable to penal servitude for seven or not less than five years (*o*); or to imprisonment for not more than three years, and (if the court shall so direct) to be whipped not more than thrice during that period (*p*).

IV. A fourth offence of the same species as the last—sometimes described, though rather inaccurately, as *treason felony*—has also been made the subject of recent legislation, in order to substitute a milder penalty than death, with regard to certain classes of treasonable practices, and thus facilitate the conviction of the criminal. For by 11 & 12 Vict. c. 12, intituled "An Act for the better security of the Crown and Government of the United Kingdom," if any

(*l*) Hawk. P. C. b. 1, c. 20, s. 3.
(*m*) 1 Hale, P. C. 374.
(*n*) 33 & 34 Vict. c. 23, s. 1.
(*o*) See 27 & 28 Vict. c. 47.
(*p*) See 5 & 6 Vict. c. 51; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

person shall (either within the united kingdom, or without) compass, imagine, invent, devise or intend to deprive or depose the Queen, her heirs or successors, from the style, honour or royal name of the imperial Crown of the united kingdom, or of any of her majesty's dominions and countries; or to levy war against her majesty, her heirs or successors, within any part of the united kingdom, in order by force or constraint to compel a change of measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, both houses or either house of parliament (*q*); or to move or stir any foreigner or stranger with force to invade the united kingdom, or any other of her majesty's dominions or countries under the obeisance of her majesty, her heirs or successors;—and shall express, utter or declare such compassings, imaginations, inventions, devices or intentions, or any of them, by publishing any printing or writing, or by any overt act or deed—the person so offending shall be guilty of felony (*r*). And on conviction he is liable, at the discretion of the court, to be sentenced to penal servitude for life, or for any term not less than five years; or to be imprisoned for any term not exceeding two years, with or without hard labour, as the court shall direct (*s*). And there is a proviso, that if the facts alleged in the indictment, or proved on the trial of any person charged with felony under this Act, shall amount in law to treason,—such indictment shall nevertheless not be deemed void, erroneous or defective; nor shall such person be entitled to be acquitted of the felony; but that no person tried for the felony, shall afterwards be prosecuted for treason upon the same facts (*t*).

(*q*) As to the *treasonable* offence of levying war against the king in his realm, vide sup. p. 170. It is to be observed that it is provided in the Act, that nothing therein contained is to lessen the force or in any manner affect anything enacted by the statute of Edw. 3.

(*r*) Three prosecutions under this statute, will be found reported in 3 Cox, C. C. pp. 509, 517, 526. See also Mulcahy *v.* The Queen, Law Rep., 3 Ap. Ca. 306.

(*s*) 11 & 12 Vict. c. 12; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

(*t*) This Act also brought within its provisions the expression, utter-

V. [A fifth offence against the sovereign may be by speaking or writing against him; cursing or wishing him ill; giving out scandalous stories concerning him (*u*), or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has been also held an offence of this species, to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die; these being acts which impliedly encourage rebellion; and for this species of contempt, it is laid down, a man may not only be fined and imprisoned, but suffer corporal punishment (*x*).

VI. Under the general title of this chapter we must also advert to what is to be found in the books as to *Præmunire*. And this offence, which forms the subject of many stringent statutes long since dormant, deserves, nevertheless, from its connection with our political and ecclesiastical history, a more full and particular consideration, than its degree of importance as a matter of practical law might appear to deserve (*y*).

ance or declaration of any such compassings, imaginations, inventions, devices or intentions as are mentioned in the text, *by open and advised speaking* only; but prosecutions for such felonies were to be instituted only within a certain period after the passing of the Act; and that period has long since expired. (11 & 12 Vict. c. 12, s. 4.)

(*u*) As by asserting falsely that he labours under mental derangement. (R. *v.* Harvey, 2 B. & C. 257.)

(*x*) Hawk. P. C. b. 1, c. 23, s. 3. Blackstone remarks (vol. iv. p. 123), that in the antient German empire, such persons as endeavour to sow sedition and disturb the public tranquillity were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The Emperors Otho the first and Frederick Barbarossa inflicted this punishment on noblemen of the highest rank; Blackstone cites Mod. Un. Hist. xxxix. 28, 119.

(*y*) From the seventh Report of the Criminal Law Commissioners (dated 11th March, 1843), p. 42, it seems that nine enactments still remain on the statute book under

[The offence of *præmunire*, was so called from the words of the writ preparatory to the prosecution thereof: *præmunire facias A. B.* (*z*), cause A. B. to be forewarned that he appear before us to answer the contempt wherewith he stands charged; which contempt is particularly recited in the preamble to the writ (*a*). It took its original from the exorbitant power claimed and exercised in England by the Pope; which, even in the days of blind zeal, was too heavy for our ancestors to bear.

It may justly be observed, that religious principles,—which, when genuine and pure, have an evident tendency to make their professors better citizens as well as better men,—have, when perverted and erroneous, been usually subversive of civil government; and been made both the cloak and the instrument, of every pernicious design that can be harboured in the heart of man. The unbounded authority that was exercised by the Druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet,—both witness to the truth of that antient universal observation, that, in all ages and in all countries, civil and ecclesiastical tyranny are mutually productive of each other. It is, therefore, the glory of the Church of England, that she inculcates due obedience to lawful authority; and hath been, as her prelates on a trying occasion once expressed, in her prin-

which the penalties of a *præmunire* may be incurred. But according to Mr. Christian (4 Bl. Com. p. 118), there is only one instance of such a prosecution in the State Trials; in which case the penalties of a *præmunire* were inflicted upon some persons for refusing to take the oath of allegiance in the reign of Charles the second. (See Harg. St. Tr. vol. ii. p. 463.)

(*z*) A barbarous word for *præmoneri*. *Præmuneo*, in law Latin, is used for *præmoneo*, or *cito*. (Ducange, Gloss.) Fuller (Cent. xiv. p. 148) suggests that *præmunire* means to fence and fortify the regal power from foreign assault; and this is adopted by D'Aubigné in his Hist. of the Reformation, (vol. v. p. 107). But the account of the word given by Ducange, seems the true one.

(*a*) Old Nat. Brev. 101, edit. 1534.

[ciples and practice most unquestionably loyal (*b*). The clergy of her persuasion, holy in their doctrines, and unblemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the Scriptures, so in matters of external polity and of private right they derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their lawgiver; and pride themselves in nothing more justly than in being true members of the Church, emphatically *by law* established. Whereas the notions of ecclesiastical liberty in those who differ from them, as well in one extreme as in the other, (for we here only speak of extremes,) are equally and totally destructive of those ties and obligations by which all society is kept together; equally encroaching on those rights which reason and the original contract of every free state have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effect of such a religious bigotry, when actuated by erroneous principles, even of the Protestant kind, are sufficiently evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England who murdered their sovereign, and overturned the church and monarchy. But these horrid devastations, the effects of mere madness, or of zeal that was nearly allied to it, though violent and tumultuous, were but of short duration: whereas the progress of papal policy, long actuated by the steady counsels of successive pontiffs, took deeper root; and was at length, in some places with difficulty, in others never yet extirpated. For this we might call to witness the black intrigues of the Jesuits, at one time triumphant over Christendom; but the subject under our present consideration rather leads

(*b*) Address to James the second, 1687.

[us to investigate the vast strides which were formerly made in this kingdom by the popish clergy,—how nearly they arrived to effecting their grand design,—some few of the means they made use of for establishing their plan,—and how almost all of them have been defeated or converted to better purposes, by the vigour of our free constitution and the wisdom of successive parliaments.

The antient British Church, by whomsoever planted, was a stranger to the bishop of Rome and all his pretended authority. But the pagan Saxon invaders, having driven the professors of Christianity to remotest corners of our island, their own conversion was afterwards effected by Augustin the monk and other missionaries from the court of Rome. This naturally introduced some few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the Pope in these kingdoms till the era of the Norman conquest; when the then reigning pontiff, having favoured Duke William in his projected invasion by blessing his host and consecrating his banners, took that opportunity also of establishing his spiritual encroachments; and was even permitted so to do by the policy of the Conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates—prelates, who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in riveting the chains of a free-born people.

The most stable foundation of legal and rational government, is a due subordination of rank, and a gradual scale of authority; and tyranny also itself is most surely supported by a regular increase of despotism arising from the slave to the sultan. With this difference, however, that the measure of obedience in the one is grounded on the principles of society, and is extended no further than reason and necessity will warrant; in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded.

[More effectually therefore to enslave the consciences and minds of the people, the Romish clergy themselves paid the most implicit obedience to their own superiors or prelates: and they, in their turns, were as blindly devoted to the will of the sovereign pontiff; whose decisions they held to be infallible, and his authority co-extensive with the Christian world. Hence his legates, *à latere*, were introduced into every kingdom in Europe; his bulls and decretal epistles became the rule both of faith and discipline; his judgment was the final resort in all cases of doubt or difficulty; his decrees were enforced by anathemas and spiritual censures; he dethroned even kings that were refractory: and denied to whole kingdoms, when undutiful, the exercise of Christian ordinances, and the benefits of the gospel of God.

But though the being spiritual head of the Church was a thing of great sound, and of greater authority, yet the court of Rome was fully apprised that among the bulk of mankind power cannot be obtained without property; and therefore its attention began very early to be riveted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the souls of the deceased. Newfangled offences were created and indulgences were sold to the wealthy, for liberty to sin without danger.

The canon law took cognizance of crimes, enjoined penances *pro salute animæ*, and commuted that penance for money. Non-residence and pluralities among the clergy, and marriages among the laity related within the seventh degree, were strictly prohibited by canon; but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of Christendom was gradually drained by a thousand channels into the coffers of the holy see.

The establishment also of the feudal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince,

[gave a hint to the court of Rome for usurping a similar authority over all the preferments of the Church, which began first in Italy, and gradually spread into England.

The Pope became a feudal lord, and all ordinary patrons were to hold their right of patronage under this universal superior. Estates held by feudal tenure, being originally gratuitous donations, were at that time denominated *beneficia;* their very name as well as constitution was borrowed, and the care of the souls of a parish thence came to be denominated a *benefice* (*c*). Lay fees were conferred by investiture or delivery of corporal possessions; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture by institution from the bishop and induction under his authority. As lands escheated to the lord in defect of a legal tenant, so benefices lapsed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy, were equivalent to the feudal render, or rent, reserved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vassal by his superior; the *primer seisins* of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy: and the occasional aids and talliages levied by the prince on his vassals, gave a handle to the Pope to levy, by the means of his legates *à latere*, Peterpence and other exactions.

At length the holy father went a step beyond any example, of either emperor or feudal lord; he reserved to himself, by his own apostolical authority, the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither or back again; and, moreover, such also as became vacant by his promotion to a bishopric or abbey, "*etiamsi ad illa personæ consueverint et debuerint*

(*c*) Vide sup. vol. I. p. 172.

[*per electionem, aut quemvis alium modum, assumi*" (*d*). And this last, the canonists declared, was no detriment at all to the patrons, being only like the change of a life in a feudal estate by the lord.

Dispensations to avoid these vacancies begat the doctrine of *commendams;* and papal *provisions* were the previous nomination to such benefices before they became actually void, though the term was afterwards indiscriminately applied to any right of patronage exerted or usurped by the Pope. In consequence of which the best livings were filled by Italian and other foreign clergy; equally unskilled in, and adverse to, the laws and constitutions of England. The very nomination to bishoprics,—that antient prerogative of the Crown,—was wrested from King Henry the first and afterwards from his successor King John, and seemingly indeed conferred on the chapters belonging to each see; but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the Pope. And to sum up this head with a transaction most unparalleled and astonishing in its kind, Pope Innocent the third had at length the effrontery to demand, and King John the meanness to consent to, a resignation of his crown to the Pope, whereby England was to become for ever St. Peter's patrimony; and the dastardly monarch re-accepted his sceptre from the hands of the papal legate, to hold as the vassal of the holy see, at the annual rent of a thousand marks.

Another engine set on foot, or at least greatly improved by the court of Rome, was a masterpiece of papal policy. Not content with the ample provision of tithes which the law of the land had given to the parochial clergy, they endeavoured to grasp at the lands and inheritances of the kingdom; and had not the legislature withstood them, would in time probably have been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine, and other

(*d*) Extrav. l. 3, t. 2, c. 13.

[rules; men of sour and austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior the Pope. And as in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe that founding a monastery a little before their deaths would atone for a life of incontinence, disorder and bloodshed. Hence, innumerable abbeys and religious houses were built within a century after the Conquest, and endowed not only with the tithes of parishes, (which were ravished from the secular clergy,) but also with lands, manors, lordships, and extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friars, was consecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege.

We might here have enlarged upon other contrivances set on foot by the court of Rome, for effecting an entire exemption of its clergy from any intercourse with the civil magistrate;—such as the separation of the ecclesiastical court from the temporal; the appointment of its judges by merely spiritual authority, without any interposition from the Crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal. But we shall only observe, at present, that notwithstanding this plan of pontifical power was so deeply laid, and was so indefatigably pursued by the unwearied politics of the court of Rome, through a long succession of ages; notwithstanding it was polished and improved by the united endeavours of a body of men who engrossed all the learning of Europe for centuries together; notwithstanding it was firmly and resolutely executed by

[persons the best calculated for establishing tyranny and despotism,—being fired with a bigoted enthusiasm which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments; and being unconnected with their fellow subjects, and totally indifferent what might befal that posterity to which they bore no endearing relation;—yet it vanished into nothing when the eyes of the people were a little enlightened, and they set themselves with vigour to oppose it. So vain and ridiculous is the attempt to live in society, without acknowledging the obligations which it lays us under; and to affect an entire independence of that civil state, which protects us in all our rights; and gives us every other liberty, that only excepted of despising the laws of the community.

Having thus in some degree endeavoured to trace out the original and subsequent progress of the papal usurpation, let us now return to the statutes of *præmunire;* which were framed to encounter this overgrown, yet increasing evil. King Edward the first, a wise and magnanimous prince, set himself in earnest to shake off this servile yoke (*e*). He would not suffer his bishops to attend a general council, until they had sworn not to receive the papal benediction. He made light of all papal bulls and processes: attacking Scotland in defiance of one; and seizing the temporalities of his clergy, who, under pretence of another, refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain; thereby closing the great gulf, in which all the lands of the kingdom were in danger of being swallowed: and one of his subjects having obtained a bull of excommunication against another, he ordered him to be executed as a traitor, according to the antient law (*f*). And in the thirty-fifth year of his reign, was made the first statute against papal provisions; being, according to

(*e*) Dav. 83, &c. Treason, 14; 5 Rep. part 1, fol. 12;
(*f*) Bro. Abr. tit. Coronæ, 115; 3 Ass. 19.

[Sir Edward Coke, the foundation of all the subsequent statutes of *præmunire;* which is ranked as an offence immediately against the sovereign, because every encouragement of the papal power is a diminution of the authority of the Crown (*g*).

In the weak reign of Edward the second, the Pope again endeavoured to encroach, but the parliament manfully withstood him; and it was one of the principal articles charged against that unhappy prince, that he had given allowance to the bulls of the see of Rome. But Edward the third was of a temper extremely different: and to remedy these inconveniences first by gentle means, he and his nobility wrote an expostulation to the Pope; but receiving a menacing and contemptuous answer,—withal acquainting him that the emperor, who, a few years before, at the Diet of Nuremberg, A.D. 1323, had established a law against provisions, and also the king of France, had lately submitted to the holy see;—the king replied, that if both the Emperor and the French king should take the Pope's part, he was ready to give battle to them both in defence of the liberties of the Crown (*h*). Hereupon more sharp and penal laws were devised against provisors: which enacted, severally, that the Court of Rome shall not present or collate to any bishopric or living in England: and that whoever disturbs any patron in the presentation to a living, by virtue of a papal provision, shall pay fine and ransom to the king at his will, and be imprisoned till he renounced such provision; and the same punishment was inflicted on such as cite the king, or any of his subjects, to answer in the court of Rome (*i*). And when the holy see resented these proceedings, and Pope Urban the fifth attempted to revive the vassalage and annual rent to which King John had subjected the kingdom, it was unanimously

(*g*) 2 Inst. 583.

(*h*) See Mod. Un. Hist. xxix. 293.

(*i*) See stat. 25 Edw. 3, st. 6; 27 Edw. 3, st. 1, c. 1; 38 Edw. 3, st. 2, cc. 1, 2, 3, 4.

[agreed by all the estates of the realm, in parliament assembled, in the fortieth year of Edward the third, that King John's donation was null and void; being without the concurrence of parliament, and contrary to his coronation oath. And all the temporal nobility and commons engaged, that if the Pope should endeavour, by process or otherwise, to maintain these usurpations, they would resist and withstand him to the utmost of their power (*k*).

In the reign of Richard the second, it was found necessary to sharpen and strengthen these laws; and therefore it was enacted by statutes 3 Rich. II. c. 3, and 7 Rich. II. c. 12, first, that no alien should be capable of letting his benefice to farm,—in order to compel such as had crept in, at least to reside on their preferments; and afterwards that no alien should be capable of being presented to any ecclesiastical preferment, under the penalties of the statutes of provisors. By the statute 12 Ric. II. c. 15, all liege men of the king accepting of a living by any foreign provision, were put out of the king's protection, and the benefice made void. To which the statute 13 Ric. II. st. 2, c. 2, added banishment and forfeiture of lands and goods: and by the third chapter of the same statute, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, was to be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

In the writ for the execution of all these statutes, the words *præmunire facias* being, (as we said,) used to demand a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *præmunire;* and accordingly the next statute we shall mention is usually called the Statute of *Præmunire*. It is the statute 16 Ric. II. c. 5; which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excom-

(*k*) Seld. in Flet. 10, 4.

[munications, bulls, instruments, or other things which touch the king, against him, his Crown and realm; and all persons aiding and assisting therein; shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council: or process of *præmunire facias* shall be made out against them, as in other case of provisors.

By the statute 2 Hen. IV. c. 3, all persons who accept any provision from the Pope to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *præmunire*. And this is the last of our antient statutes touching this offence; the usurped civil power of the bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards; the spirit of the nation being so much raised against foreigners, that about this time, in the reign of Henry the fifth, the alien priories or abbeys for foreign monks were suppressed, and their lands given to the Crown. And even prior to the Reformation, all further attempts on the part of our own ecclesiastics to support these foreign jurisdictions had ceased.

A learned writer above referred to, is therefore greatly mistaken, when he says, that in the time of Henry the sixth, the archbishop of Canterbury and other bishops offered to the king a large supply, if he would consent that all laws against provisors, and especially the statute of 16 Ric. II., might be repealed; but that this motion was rejected (*l*). This account is incorrect in all its branches. For, first, the application which he probably means, was made not by the bishops only, but by the unanimous consent of a provincial synod, assembled in 1439, in the eighteenth year of Henry the sixth: that very synod, which at the same time refused to confirm and allow a papal bull, which was then laid before them. Next, the purport of it was not to procure a repeal of the

(*l*) Dav. 96.

[statutes against provisors, or that of Richard the second in particular; but to request that the penalties thereof,—which were applied by a forced construction to all that sued in the spiritual, and even in many temporal, courts of this realm,—might be turned against the proper objects only, those who appealed to Rome, or to any foreign jurisdictions; the tenor of the petition being, "that those "penalties should be taken to extend only to those that "commenced any suits, or procured any writs or public "instruments at Rome, or elsewhere out of England; "and that no one should be prosecuted upon that statute "for any suit in the spiritual courts, or lay jurisdictions "of this kingdom." Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament; and, in the mean time, that no one should be molested upon this account. And the clergy were so satisfied with their success, that they granted to the king a whole tenth upon this occasion (*m*).

And, indeed, so far was the archbishop, who presided in this synod, from countenancing the usurped power of the Pope in this realm, that he was ever a firm opposer of it. And, particularly, in the reign of Henry the fifth, he prevented the king's uncle from being then made a cardinal, and legate *à latere* from the Pope; upon the mere principle of its being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. For, as he expressed himself to the king in his letter upon the subject, "he was bound to "oppose it by his ligeance, and also to quit himself to "God, and the church of this land, of which God and "the king had made him the governor." This was not the language of a prelate addicted to the slavery of the see of Rome; but of one who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod, the seventeenth year of Henry the sixth, he refused to consecrate a bishop of Ely that was

(*m*) Wilk. Concil. Mag. Brit. iii. 533.

[nominated by Pope Eugenius the fourth,—a conduct quite consonant to his former behaviour in the sixth year of Henry the sixth, when he refused to obey the commands of Pope Martin the fifth, who had required him to exert his endeavours to repeal the statute of *præmunire*; "*illud execrabile statutum*," as the holy father phrases it; which refusal so far exasperated the court of Rome against him, that at length the Pope issued a bull to suspend him from his office and authority, which the archbishop disregarded, and appealed to a general council. And so sensible were the nation of their primate's merit, that the lords spiritual and temporal, and also the University of Oxford, wrote letters to the Pope in his defence; and the house of commons addressed the king to send an ambassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the Pope for opposing the excessive power of the court of Rome (*n*).

This, then, is the original meaning of the offence which we call *præmunire*, viz., introducing a foreign power into this land; and creating *imperium in imperio*, by paying that obedience to papal process which constitutionally belonged to the king alone, long before the Reformation in the reign of Henry the eighth. At which time the penalties of *præmunire* were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not all the corrupted doctrines of the Romish Church. And, therefore, by the several statutes of 24 Hen. VIII. c. 12, and 25 Hen. VIII. cc. 19 and 21, to appeal to Rome from any of the king's courts, (which, though illegal before, had at times been connived at); to sue to Rome for any licence or dispensation; or to obey any process from thence;—were made liable to the pains of *præmunire*. And in order to restore to the king in effect the nomination of vacant bishoprics, and yet keep up the established

(*n*) See Wilk. Concil. Magn. Brit. vol. iii. *passim*, and Dr. Duck's Life of Archbishop Chichele.

[forms,—it was enacted by statute 25 Hen. VIII. c. 20, that if the dean and chapter refused to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they should fall within the penalties of the statutes of *præmunire*.

So also by statute 13 Eliz. c. 2, to import any *agnus Dei*, crosses, beads, or other superstitious things pretended to be hallowed by the Bishop of Rome, and tender the same to be used; or to receive the same with such intent, and not discover the offender; brought on the offenders the penalties of a *præmunire* (*o*).]

Thus far the penalties of *præmunire* seem to have kept within the proper bounds of their original institution, the depressing the power of the Pope: but being pains of no inconsiderable consequence, it was afterwards thought fit to apply them by other Acts (some of which have been expressly repealed as being obsolete, though others still remain in our statute book) to other heinous offences; of these some bear more and some less relation to the original offence, and some no relation at all.

[Thus, 1. By the statute 1 & 2 Ph. & M. c. 8, to molest the possessors of abbey lands granted by parliament to Henry VIII. and Edward VI., was made a *præmunire*. 2. To obtain any stay of proceedings, (other than by arrest of judgment or writ of error,) in any suit for a monopoly, was likewise made a *præmunire* by statute 21 Jac. I. c. 3. 3. To attempt to restrain the importation or making of gunpowder, was also made a *præmunire* by 16 Car. I. c. 21. 4. On the abolition, by statute 12 Car. II. c. 24, of the prerogative of *purveyance and pre-emption* (*p*),—the exertion of any such power for the future was declared to be indictable; and in any suit thereon, to obtain any stay of proceedings other than by arrest of judgment, or writ of error, was made a *præmunire*. 5. To assert ma-

(*o*) The penalties imposed by 13 Eliz. c. 2, were repealed by 9 & 10 Vict. c. 59.

(*p*) As to this antient prerogative of the Crown, vide sup. vol. II. p. 539.

[liciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, was declared a *præmunire* by statute 13 Car. II. st. 1, c. 1. 6. By the Habeas Corpus Act also, 31 Car. II. c. 2, to send any subject of this realm (with certain exceptions in the Act specified) a prisoner into parts beyond the seas was made a *præmunire*, and one which the king could not pardon; besides being visited with other heavy penalties. 7. By statute 7 & 8 Will. III. c. 24, serjeants, counsellors, proctors, attornies, and all officers of courts practising without having taken the proper oaths were made guilty of a *præmunire*. 8. By the statute 6 Ann. c. 41, to assert maliciously and directly, by preaching, teaching, or advised speaking, that any person, other than according to the Acts of Settlement and Union, hath any right to the throne of these kingdoms, or that the king and parliament cannot make laws to limit the descent of the Crown, was declared a *præmunire*: as writing, printing or publishing the same doctrines were made to amount to treason. 9. By statute 6 Ann. c. 78, it was enacted, that if the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, should presume to treat of any other matter save only the election, they should incur the penalties of a *præmunire*. 10. The statute 12 Geo. III. c. 11, subjected to the penalties of the statute of *præmunire*, all such as should knowingly, and wilfully, solemnize, assist, or be present, at any forbidden marriage of such of the descendants of the body of King George the second, as were, by that Act, prohibited to contract matrimony without the consent of the Crown.

Having thus inquired into the nature and several species of *præmunire*, its punishment may be gathered from the foregoing statutes, which are thus shortly summed up by Sir Edward Coke. "That from the conviction the "defendant shall be out of the king's protection, and his "lands and tenements, goods and chattels, forfeited to the

[" king; and that his body shall remain in prison *at the* " *king's pleasure;* or, as other authorities have it, *during* " *life;*" both which amount to the same thing, as the king by his prerogative may any time remit the whole or any part of the punishment; except in the case of transgressing the statute of *habeas corpus* (*q*).

These forfeitures here inflicted, do not bring this offence within our former definition of felony; being inflicted by particular statutes, and not by the common law (*r*). But so odious, Sir Edward Coke adds, was this offence of *præmunire*, that a man that was attainted of the same might have been slain by any other man without danger of law; because it is provided by law that any man might do to him as to the king's enemy, and any man may lawfully kill an enemy (*s*). However, the position itself that it is at all times lawful to kill an enemy is by no means tenable; it being only lawful to kill him in the heat of battle, or for necessary self-defence. And to obviate such savage or mistaken notions the statute 5 Eliz. c. 1, s. 21, provided, that it shall not be lawful to kill any person attainted in a *præmunire;* any law, statute, opinion, or exposition of law, to the contrary notwithstanding (*t*). But still such delinquent, though protected, as a part of the public, from public wrongs, can bring no action for any private injury, how atrocious soever; being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may suffer. And no man knowing him to be guilty, can with safety give him comfort, aid, or relief (*u*).]

(*q*) 1 Inst. 129.

(*r*) Vide sup. p. 7. It may be noticed that the provision contained in the 33 & 34 Vict. c. 23, taking away the consequence of forfeiture, applies only to a conviction for treason or *felony*. But as the penalties affixed to the offence of *præmunire* are not attempted to be enforced by prosecutions, the point is of no practical importance.

(*s*) 1 Inst. 129.

(*t*) The Act in which this declaration of the law is contained, relates chiefly to other subjects, and is among those repealed by 9 & 10 Vict. c. 59.

(*u*) Hawk. P. C. b. 1, c. 19, s. 47.

VII. [*Contempts against the sovereign's title*, which fall short of treason or *præmunire*, are chiefly the denial of his right to the Crown, in common and unadvised discourse; for if it be by advisedly speaking, we have seen that it amounts to *præmunire* (*x*). This heedless species of contempt is punishable by our law with fine and imprisonment.]

VIII. *Contempt against the Crown's ecclesiastical supremacy.* This, in our own times, was considered to be committed by endeavouring to establish a hierarchy of the see of Rome within this realm, with titles invasive of the rights of our Protestant dignitaries. And by 14 & 15 Vict. c. 60 (the Ecclesiastical Titles Act, 1851), a penalty of 100*l.* was imposed upon any person who should procure from the see of Rome, or publish or put in use within the united kingdom, any bull for constituting archbishops or bishops of pretended provinces or sees; or upon any person, other than the person authorized by law, who should assume or use the title of archbishop, bishop, or dean of any city, town, place, or territory in the united kingdom (*y*). No prosecution, however, under these enactments was in fact instituted, although prelates appointed by the Pope continued to assume, both in England and Ireland, territorial titles; and it has since been thought inconvenient to retain them in our statute book. Accordingly they are repealed by the 34 & 35 Vict. c. 53,—the preamble to the Act declaring it to be inexpedient to impose penalties upon those ministers of religion "who may, as among the members of the several religious bodies to which they respectively belong, be designated by distinctions regarded as titles of office, although such designation may be connected with the name of some town or place within the realm." There is, however, a proviso attached to the repeal, that it shall not be deemed in any way to authorize or sanction

(*x*) Vide sup. p. 196.

(*y*) There is a prior enactment to the same general effect (apparently still unrepealed) contained in 10 Geo. 4, c. 7, s. 24.

the conferring of any rank, title, precedence, authority or jurisdiction over a subject of this realm by any person other than by our own gracious sovereign.

IX. [*Contempts against the royal palaces* have been always looked upon as high misprisions; and, by the antient law before the Conquest, fighting in the king's palace or before the king's judges was punished with death (*s*). So too, in the old Gothic constitution, there were many places privileged by law—"*quibus major reverentia et securitas debetur, ut templa et judicia, quæ sancta habebantur, arces et aula regis, denique locus quilibet præsente aut adventante rege*" (*a*).] And with us, by the statute 33 Hen. VIII. c. 12, malicious striking in the king's palace wherein his royal person resides, whereby blood is drawn, was punishable by perpetual imprisonment and fine at the king's pleasure, and also with the loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length (*b*); but by 9 Geo. IV. c. 31, s. 1, the part of this Act which authorized the above mutilation, is repealed. It appears, however, to be a contempt of the kind now in question to execute the ordinary process of the law, by arrest or otherwise, within the verge of a royal palace, or in the Tower; unless permission be first obtained from the proper authority (*c*).

X. [*The maladministration of such high officers as are in public trust and employment*, may be ranked as a contempt against the sovereign or his government. This is usually punished by the method of parliamentary impeachment; wherein such penalties short of death are inflicted, as to

(*s*) 2 Inst. 140; LL. Alured. cap. 7 and 34.

(*a*) Stiernh. de Jure Goth. l. 3, c. 3.

(*b*) See Knevet's case, 11 Harg. St. Tr. 16.

(*c*) See Elderton's case, Ld. Raym. 978; R. *v.* Stobbs, 3 T. R. 735; Winter *v.* Miles, 1 Camp. 475; S. C. 10 East, 578; Sparks *v.* Spink, 7 Taunt. 311; Batson *v.* M'Lean, 2 Chit. Rep. 51; Bell *v.* Jacobs, 1 M. & P. 309; but as to Hampton Court, see Att.-Gen. *v.* Dakin, Law Rep., 2 Ex. 290.

[the wisdom of the house of Lords shall seem proper; consisting usually of banishment, imprisonment, fines or perpetual disability. Hitherto also may be referred the offence of *embezzling of public money*, called among the Romans *peculatus;* which the Julian law punished with death in a magistrate, and with deportation or banishment in a private person (*d*). With us it is not a capital crime; but subjects the committer of it, at common law, to a discretionary fine and imprisonment.] And by statute 50 Geo. III. c. 59, s. 2, it was provided, that if any officer entrusted with the receipt or management of the public revenues, should knowingly furnish false statements or returns of the monies collected by him, or the balances left in his hands, he should be guilty of a misdemeanor; and be fined and imprisoned at the discretion of the court, and for ever rendered incapable of holding any office under the Crown. And special provisions have been made with regard to the *stealing* or *embezzlement* by a person in the service of the Crown, of any chattel, money or valuable security in his possession, or coming under his control, by virtue of such employment (*e*).

XI. To the same class of offences, must be referred that of *selling public offices;* as to which it was provided by 49 Geo. III. c. 126 (reciting and extending the 5 & 6 Edw. VI. c. 16 on the same subject), that persons buying or selling, or receiving or paying money or reward for, any office in the gift of the Crown; and persons receiving or paying money for, or soliciting or obtaining, any such office, or making any negotiation or pretended negotiation relating thereto; and persons opening or advertising houses for transacting business relating to the sale of any such office;—shall, respectively, be deemed guilty of a misdemeanor (*f*).

(*d*) 4 Inst. 18, 9.

(*e*) See 24 & 25 Vict. c. 96, ss. 69, 70, et vide sup. pp. 134, 135.

(*f*) As to this statute (from the provisions of which certain offices are excepted) see Hopkins *v.* Pres-

XII. Offences in relation to the *customs, the royal naval or military stores, ships, &c.* As to the *customs*, we must here refer to the offence of smuggling, that is, importing or exporting prohibited goods, or without paying the duties on goods not prohibited. This practice is a fraud on the revenue; and it is accordingly restrained by the statutes relating to the customs of which we spoke in a former volume (*g*). And by one of these, the 39 & 40 Vict. c. 36 (the Customs Consolidation Act, 1876), it is enacted, that a person who shall maliciously shoot at any vessel or boat belonging to the navy or in the service of the revenue, or shall maliciously shoot at, maim or wound any officer of the army, navy, marines or coastguard on full pay, or any officer of customs or excise, or those aiding them, while duly employed for the prevention of smuggling and in the execution of his or their duty, shall be guilty of felony, and shall be liable to penal servitude for not less than five years, or to be imprisoned for not exceeding three years (*h*). Moreover, every person procuring or hiring any person or persons to assemble for the purpose of being concerned in running prohibited goods, or goods the duties for which have not been paid, shall be imprisoned for any term not exceeding twelve months; and if such person or persons being armed with fire-arms or other offensive weapons, or disguised in any way whether armed or not, shall be found with goods liable to forfeiture under the Customs Acts within five miles of the seacoast or any tidal river, he or they shall be imprisoned with or without hard labour for any term not exceeding three years (*i*). So, also, any persons found signalling smuggling vessels shall be guilty of a misdemeanor, and may forfeit the penalty of 100*l.*, or, at the discretion of the court, be com-

cott, 4 C. B. 578; Sterry *v.* Clifton, 9 C. B. 110; Eyre *v.* Forbes, 12 C.B. (N.S.) 191. See also 6 Geo. 4, cc. 82 and 83, by which the sale of offices in the Queen's Bench and Common Pleas was expressly prohibited.

(*g*) Vide sup. vol. II. p. 565.

(*h*) 39 & 40 Vict. c. 36, s. 193.

(*i*) Sect. 189.

mitted to prison for one year (*k*). Moreover, any person taking goods from a warehouse without payment of duty, and every person destroying or embezzling goods duly warehoused (*l*), shall be guilty of a misdemeanor and punished accordingly (*m*). And finally, a person convicted of any offence under the Customs Acts who shall have been adjudged to pay a penalty exceeding 100*l*., may be imprisoned, if for a first offence, for not less than six nor more than nine months, and for a subsequent offence, in lieu of the penalty, may be imprisoned, with or without hard labour, for not less than six nor more than twelve months (*n*); and if during such his imprisonment it shall appear that he had been previously convicted, he may be further committed for not less than nine nor more than twelve months from the date of his first imprisonment (*o*).

As to the *royal stores*, such offences in relation to them, as amount to larceny or embezzlement, are punishable according to the distinctions already explained with regard to those crimes (*p*). But besides these, there are others falling under the present head, to repress which various enactments formerly existed, which are now, almost all, consolidated into the 38 & 39 Vict. c. 25 (the Public Stores Act, 1875) (*q*), which, among other provisions for which

(*k*) 39 & 40 Vict. c. 36, s. 190.

(*l*) As to warehousing goods liable to pay duty, vide sup. vol. II. p. 566.

(*m*) Sect. 85.

(*n*) Sect. 237.

(*o*) Sect. 240. It may be noticed that goods unshipped without payment of duty, prohibited goods (whether imported or shipped for exportation), goods illegally removed from a warehouse, goods concealed on board ship or boat, and goods packed therewith for the purpose of concealing them—are all liable to be forfeited (sect. 177); and that there is a penalty of 10*l*. on persons cutting adrift or injuring in any way any buoy or mark used for the prevention of smuggling or for the use of the Customs (sect. 195).

(*p*) Vide sup. pp. 134, 135. See also 29 & 30 Vict. c. 109 (The Naval Discipline Act), as to embezzlement by persons subject to that Act.

(*q*) By this Act is repealed the greater part of the War Department Stores Act, 1867 (30 & 31 Vict. c. 128), and the Naval Stores Act, 1869 (32 & 33 Vict. c. 12), as well as some earlier enactments.

we must refer the reader to the Acts themselves, enact, 1. That any one (not being a public department, or its contractors, officers or workmen, or some other person with lawful authority,) who shall apply in or on any of her Majesty's stores the *broad arrow*, or other royal mark,—shall be guilty of a *misdemeanor*, and liable to imprisonment for not more than two years, with or without hard labour (*r*). 2. That any person, who, with intent to conceal her Majesty's property in such stores, shall take out, destroy or obliterate any such mark,—shall be guilty of *felony*, and liable to penal servitude for any term not exceeding seven years, or to imprisonment for not more than two years, with or without hard labour (*s*).

Moreover, by 12 Geo. III. c. 24, to *set on fire, burn or destroy* any of her Majesty's ships of war, (whether built, building or repairing,) or any of the arsenals, magazines, dockyards, ropeyards, or victualling offices of the Crown, or materials thereto belonging, or any military, naval or victualling stores or ammunition; or to aid, procure, abet or assist in any of such offences,—is made a felony punishable with *death* (*t*).

XIII. The offence of *serving foreign states* (*u*), which service is generally inconsistent with allegiance to one's natural prince, is now restrained and punishable by the

(*r*) 38 & 39 Vict. c. 25, s. 4.

(*s*) Sect. 5.

(*t*) No other description of criminal firing, &c. is now a capital offence (vide sup. p. 105). The provision in the text, however, is still in force; though under 4 Geo. 4, c. 48, judgment of death in such case may *be ordered to be recorded* in place of pronouncing it in open Court, and the effect of this is to save the offender's life. In reference to this provision of 12 Geo. 3, the report of the Criminal Code Bill Commission observes (p. 19), that the proceeding of recording a sentence of death under 4 Geo. 4, c. 48, and not putting it into execution, is an objectionable one; and that, in this particular case, it would be better to make the offence only punishable as arson, viz. by penal servitude for life as a maximum punishment.

(*u*) As to receiving a *pension* from a foreign prince, vide post, p. 208.

33 & 34 Vict. c. 90 (the Foreign Enlistment Act, 1870), which provides that if any British subject, without the licence of her majesty (*x*), shall accept any commission in the military or naval service of any foreign state at war with any foreign state at peace with her majesty, or as the Act expresses it, "with any friendly state,"—or shall induce any other person so to do—or shall quit or attempt to quit her majesty's dominions with the intention of accepting such commission;—he shall, in any of the above cases, be punishable by fine or imprisonment, to the extent of two years, or both (*y*). And further, that if any person within her Majesty's dominions, (without licence from the Crown first obtained,) shall build or equip any ship for the service of any foreign state at war with a friendly state, or shall issue any commission for any such ship, or shall increase the number of her guns or equipment for war, or shall be concerned in augmenting her warlike force;—such offender shall also be guilty of a misdemeanor, and may be punished in the same manner (*z*).

Moreover, by the same Act, any ship violating the provisions thereof may be *detained*, either by the local authority, as defined therein, or by the order of the secretary of state, or the chief executive authority (*a*).

XIV. The offences of *desertion* or *seducing to desert*, from the army or navy (*b*).

These offences are now mainly provided against by the

(*x*) A licence for this purpose may either be under the royal sign manual, or by order in council, or by proclamation. (33 & 34 Vict. c. 90, s. 15.)

(*y*) Sect. 13. The imprisonment may be either with or without hard labour. (Sects. 4, 5, 6.)

(*z*) As to these enactments of our municipal law (of which only the more important are referred to in the text) in reference to the law of nations, vide post, p. 219. The statute of 33 & 34 Vict. c. 90, is in substitution of an Act on the same subject (59 Geo. 3, c. 69). There was a still earlier one (3 Jac. 1, c. 4), the penalties of which were repealed by 9 & 10 Vict. c. 59.

(*a*) 33 & 34 Vict. c. 90, ss. 21—23.

(*b*) As to seamen or apprentices deserting from the *merchant service*, see 17 & 18 Vict. c. 104, s. 243.

29 & 30 Vict. c. 109 (the Naval Discipline Act, 1866), and by the 42 & 43 Vict. c. 33 (the Army Discipline and Regulation Act, 1879), by which statutes (when the offender is subject to their provisions) he may be tried by a court-martial, who may inflict such punishment as is specified therein (*c*).

In addition, however, to the above Acts there is a statute 37 Geo. III. c. 70 (*d*), which enacts that any person maliciously endeavouring to seduce any person, serving in the Royal forces by sea or land, from their allegiance; or stirring up any such persons to mutiny or to any traitorous or mutinous practice;—shall be guilty of felony. Under this Act he was made punishable with *death;* but by the effect of later statutes, he is now liable, if convicted under its provisions, to penal servitude for life, or any term not less than five years; or to be imprisoned, with or without hard labour or solitary confinement, for any term not more than two years (*e*).

XV. Another class of offences ranging itself under the present head, is that of administering *unlawful oaths;* or of being engaged in *illegal societies.*

It is enacted by 37 Geo. III. c. 123, that whoever shall administer or cause to be administered, or shall be present at and consenting to the administering of,—or shall himself take,—any *oath or engagement* intended to bind any person in any mutinous or seditious purpose; or to bind him to belong to any seditious society or confederacy; or to obey any committee, or any person not having legal authority for that purpose; or not to give evidence against any confederate or other person; or not to discover any

(*c*) As to these statutes, vide sup. vol. II. pp. 591, 597.

(*d*) This Act, at first temporary only, was made perpetual by 57 Geo. 3, c. 7. A statute on this subject, 1 Geo. 1, c. 47, is repealed by 30 & 31 Vict. c. 59.

(*e*) 7 Will. 4 & 1 Vict. c. 91; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

"unlawful combination" or illegal act, or illegal oath or engagement,—shall be guilty of felony; and he may be sentenced to penal servitude for not more than seven nor less than five years (*f*).

And further, that to have taken such oath or engagement under *compulsion* shall be no excuse, unless the person compelled shall within four days after he has an opportunity, disclose the whole of the case to a justice of the peace; or, in the case of a soldier or seaman, to his commanding officer.

Moreover, by 39 Geo. III. c. 79; 52 Geo. III. c. 104; and 57 Geo. III. c. 19;—all societies are to be deemed *unlawful combinations* of which the members shall take such oaths or engagements as are expressly prohibited by 37 Geo. III. c. 123, or are not required by law, or of which the members shall subscribe any unauthorized test or declaration; as well as all societies which shall comprise members whose names shall be unknown to the society at large, and societies consisting of different branches, which shall elect committees or delegates to communicate with other societies; and persons becoming members of such unlawful combinations, or aiding, abetting, or supporting the same, may be either proceeded against by way of summary conviction before justices, or they may be prosecuted by indictment,—in which case they may be sentenced to penal servitude for not more than seven nor less than five years, or imprisoned for any time not exceeding two years (*g*). On the other hand, regular lodges of Freemasons, societies duly established under the statutes in force relating to friendly societies (*h*), meetings of Quakers, and meetings of a religious or charitable nature only,

(*f*) 37 Geo. 3, c. 123, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

(*g*) See 39 Geo. 3, c. 79; 52 Geo. 3, c. 104; 57 Geo. 3, c. 19; 9 & 10 Vict. c. 33; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

(*h*) Vide sup. vol. III. p. 86.

do not come within the prohibiting enactments of the Acts; and such of their provisions as relate to *oaths and engagements* do not extend to any form of declaration approved by two justices, and registered as in the Acts provided.

By one of the above Acts, viz. by 52 Geo. III. c. 104, it is also provided that every person who shall administer or cause to be administered, or be aiding or assisting in the administration of, any oath or engagement intending to bind the party sworn to the commission of any *treason*, *murder* or *capital felony*,—shall be guilty of felony; and he may be sentenced to penal servitude for life, or for not less than five years, or be imprisoned, with or without hard labour and solitary confinement, for any term not more than two years (*i*). And it is further enacted, that every person taking such oath or engagement, (not being compelled,) shall also be guilty of felony, and liable to penal servitude for life, or such time as the court may direct; and that compulsion shall be no excuse, unless the party compelled makes discovery of the case within fourteen days (*j*).

XVI. There are also certain *miscellaneous contempts* against the royal prerogative, not properly falling under any of the preceding heads. [Such as, 1. Concealing treasure trove, which, (as we have elsewhere explained,) belongs to the sovereign or his grantees by prerogative royal (*k*); and the concealment of which was formerly punishable by death (*l*), but now only by fine and imprisonment (*m*). 2. Preferring the interests of a foreign potentate to those of our own, or doing or receiving anything that may create an undue influence in favour of such extrinsic

(*i*) 52 Geo. 3, c. 104; 7 Will. 4 & 1 Vict. c. 91; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

(*j*) 52 Geo. 3, c. 104, ss. 1, 2.

(*k*) Vide sup. vol. II. p. 548.

(*l*) Glanv. l. 1, c. 2.

(*m*) 3 Inst. 133.

[power; as by taking a pension from any foreign prince without the consent of the Crown (*p*). 3. Disobeying the sovereign's lawful command;—whether by writs issuing out of his courts of justice; or by a summons to attend his privy council; or by letter from him to a subject, commanding him to return from beyond the seas, (for disobedience to which, his lands shall be seized till he does return, and himself afterwards punished). 4. Disobedience to any Act of Parliament, where no particular penalty is assigned. All these are given in the books as instances of misprision and contempts; the general punishment whereof are fine and imprisonment, at the discretion of the courts of justice (*q*).]

XVII. *Riotously demolishing churches, houses, buildings or machinery.* By 24 & 25 Vict. c. 97 (*r*), if any persons, riotously and tumultuously assembled together to the disturbance of the peace, shall unlawfully and with force demolish, pull down, or destroy (or begin to demolish, pull down, or destroy) any *church*, chapel, meeting-house, or other place of divine worship; or any *house*, stable, or other such buildings, engines, or machinery such as are in the Act mentioned,—they shall be guilty of felony: and are liable to penal servitude for life, or any term not less than five years; or to be imprisoned, with or without hard labour, for any term not more than two years (*s*).

(*p*) 3 Inst. 144.

(*q*) Hawk. P. C. b. 1, c. 22, s. 5.

(*r*) Provisions were also contained in 1 Geo. 1, st. 2, c. 5, against the riotous destruction of churches and other places of religious worship, making such offences capital felonies; but these enactments were repealed by 7 & 8 Geo. 4, c. 27; and the offence of riotous demolishment generally, was provided against by c. 30 of the same session, s. 8. This last provision was repealed by 24 & 25 Vict. c. 95, but re-enacted by that which is given in the text.

(*s*) 24 & 25 Vict. c. 97, s. 11. (See 27 & 28 Vict. c. 47.) The offenders, if the court think fit, may also be bound over with sureties to keep the peace. (Sect. 73.) Moreover, if such persons shall even *injure or damage* such church or building, they are (by sect. 12) made guilty of misdemeanor, and are liable to imprisonment for two, or penal servitude to the extent of seven, years. As to this section see R. *v.* Langford, Car. & Marsh. 602.

And by a previous Act, viz. by 7 & 8 Geo. IV. c. 31, ss. 2, 3, if any church, chapel, house, or such buildings or machinery as therein mentioned, shall be feloniously demolished, (wholly or in part,) by persons riotously and tumultuously assembled together, the inhabitants of the hundred shall be liable to yield full compensation (*t*);—provided that the persons damnified, or such of them as have knowledge of the circumstances, or the servants who had the care of the property, shall, within seven days, go before some justice of the peace residing near and having jurisdiction; shall state upon oath the names of the offenders, if known; shall submit to examination touching the circumstances; and shall become bound, by recognizance, to prosecute: and provided also, that an action against the hundred be commenced within three calendar months after the offence (*u*).

XVIII. Another offence against public order, is that of the illegal destruction of such beasts and fowl as are ranked under the denomination of *game*; concerning the nature of which, (considered as a species of *property*,) we had occasion in a former volume to enter into some discussion.

It will be necessary here, however, to add to what is there contained, some notice of the penal enactments relative to its destruction in the night-time; which (from obvious considerations) is treated as an offence of considerable gravity. Accordingly, by 9 Geo. IV. c. 69, and 7 & 8 Vict. c. 29 (*x*), it was provided, that if a person shall, *by*

(*t*) See 32 & 33 Vict. c. 47, s. 5. As to the "hundred," vide sup. vol. I. p. 125.

(*u*) When the damage caused by the demolition or attempted demolition does not exceed 30*l*. the statute makes it recoverable by a summary proceeding before justices at a special petty session (7 & 8 Geo. 4, c. 31, s. 8). By 2 & 3 Will. 4, c. 72, the provisions of 7 & 8 Geo. 4, c. 31, on this subject are extended to the damage or destruction of *threshing machines*: and by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 477, to the plunder, damage or destruction of *ships or boats* stranded or in distress.

(*x*) There is also a provision in 24 & 25 Vict. c. 96, s. 17, with respect to the unlawful taking or killing hares or rabbits in warrens, *by night*.

night (*y*), unlawfully take or destroy game or rabbits, in any land (whether open or enclosed); or on any public road, highway or path, or the sides thereof; or at the openings, outlets or gates from any such lands into such roads;—or shall, *by night*, be in such places, with any gun, net, engine or other instrument, for the purpose of taking or destroying game:—he shall be liable to imprisonment, for the first offence, for any period not exceeding three months, with hard labour; and, at the expiration of such period, to be bound over to his good behaviour by sureties for a year; or, in default of such recognizance, to be further imprisoned for six months, or until such sureties are found (*z*). For a second offence, such person shall be liable to imprisonment for six months, and then to be bound in sureties for two years; and in default thereof, to be further imprisoned for one year, or until such sureties are found (*a*). And if he shall offend a third time, he is guilty of a misdemeanor; and he is then liable to penal servitude for not more than seven nor less than five years, or to be imprisoned, with hard labour, for any time not exceeding two years (*b*). It is moreover provided, that when any person shall be found committing such offence, it shall be lawful for the owner or occupier of the land; or for any person having a right of free warren or free chase therein; or for the lord of the manor; or for the gamekeeper or servant of such persons or their assistants; —to seize and apprehend the person so offending; and in case he shall assault or offer violence with an offensive weapon, towards any one so authorized to apprehend him, he is guilty of a misdemeanor; and he is, in that case, liable to penal servitude for not more than seven nor less

(*y*) By 9 Geo. 4, c. 69, s. 12, the *night*, for the purpose of this provision, shall be considered to commence at the expiration of one hour after sunset, and to conclude at the beginning of the last hour before sunrise.

(*z*) Sect. 1.

(*a*) Ibid.

(*b*) Ibid.; 7 & 8 Vict. c. 29; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

than five years, or to be imprisoned, with hard labour, for any term not exceeding two years (*c*).

It is further enacted that if *three or more* persons shall, *by night*, unlawfully enter any lands or roads, for the purpose of taking or destroying game or rabbits (any of them being armed with a gun or other offensive weapon), each of such persons shall be guilty of a misdemeanor: and they shall severally be liable to penal servitude for any term not more than fourteen years, nor less than five years; or to be imprisoned, with hard labour, for not more than two years (*d*).

XIX. [*Affrays*, (from *affraier*, to terrify,) are the fighting of two or more persons in some public place (*e*), to the terror of her Majesty's subjects; for if the fighting be in private it is no *affray*, but an *assault* (*f*). Affrays are misdemeanors; and may be suppressed by any private person present: who is justifiable in endeavouring to part the combatants, whatever consequences may ensue (*g*). But more especially the constable or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers: and may either carry them

(*c*) 9 Geo. 4, c. 69, s. 1; 7 & 8 Vict. c. 29; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47. (See Cureton *v.* The Queen, 1 B. & Smith, 208.)

(*d*) 9 Geo. 4, c. 69, s. 9; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47. See the following cases as to the construction of 9 Geo. 4, c. 69, s. 9; R. *v.* Dowsell, 6 Car. & P. 398; R. *v.* Gainer, 7 Car. & P. 231; R. *v.* Kendrick, ib. 184; R. *v.* Davis, 8 Car. & P. 759; R. *v.* Fry, 2 M. & Rob. 42; Fletcher *v.* Calthrop, 6 Q. B. 880; R. v. Jones, 2 Cox's Cr. C. 185; R. *v.* Merry, ib. 240; R. *v.* Whitaker and others, 17 L. J. (M. C.) 127; R. *v.* Uezzell and others, 20 L. J. (M. C.) 192.

(*e*) As to the case of the actors and spectators at a prize fight, see 1 East, P. C. c. 5, s. 41; Hawk. P. C. b. 1, c. 63, s. 2; R. *v.* Bellingham, 2 C. & P. 234; R. *v.* Perkins, 4 C. & P. 537; R. *v.* Hargrave, 5 C. & P. 170. It seems questionable whether the offence thus committed, is properly speaking an "unlawful assembly," "an affray," or "an assault."

(*f*) Hawk. P. C. ubi sup.

(*g*) Ib. s. 13.

[before a justice, or imprison them by his own authority for a convenient space till the heat is over (*h*). The punishment of *common* affrays, is by fine and imprisonment: the measure of which must be regulated by the circumstances of the case: for, where there is any material aggravation, the punishment proportionably increases.] As where two persons coolly and deliberately engage in a duel (*i*); this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, and may even, as an attempt at murder, amount to felony under 24 & 25 Vict. c. 100, s. 14, though no mischief has actually ensued (*j*). [Another aggravation of an affray is, when thereby the ministers of justice are disturbed in the due execution of their office; or where a respect to the particular place, ought to restrain and regulate men's behaviour more than in common ones, as in the court of the sovereign, and the like (*k*). And upon the same account also, all affrays in a church or churchyard, are esteemed very heinous offences; as being indignities to Him to whose service those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are here penal. For it was enacted by statute 5 & 6 Edw. VI. c. 4 (*l*), that if any person shall—though by words only—quarrel, chide, or brawl in a church or churchyard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ;* and, if a clerk in orders, from the ministration of his office during pleasure (*m*); and that if any person in such church or church-

(*h*) Hawk. P. C. b. 1, c. 63, s. 13. It seems that a constable has no power to arrest without warrant, for an *affray* committed out of his own presence. See Cook *v.* Nethercote, 6 C. & P. 741; Fox *v.* Gaunt, 3 B. & Ad. 798; R. *v.* Curvan, R. & M. C. C. R. 132; R. *v.* Bright, 4 C. & P. 387.

(*i*) See Hawk. ubi sup. s. 21.

(*j*) Vide sup. p. 78.

(*k*) Hawk. ubi sup. c. 21, ss. 6, 10; c. 63, s. 23.

(*l*) See also 1 W. & M. c. 18, s. 18.

(*m*) As to this statute, see Cox *v.* Goodday, 2 Hagg. R. 139.

[yard proceed to smite or lay violent hands upon another, he shall be excommunicated *ipso facto* (*n*).] And though these enactments are now, by 23 & 24 Vict. c. 32, s. 5, repealed as to brawling by a person not in holy orders, yet they seem to be in other respects still in force (*o*). Two persons may be guilty of an affray; but—

XX. *Riots, routs, and unlawful assemblies* must have three persons at least to constitute them. 1. A *riot*, seems to be a tumultuous disturbance of the peace by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them, in the execution of some enterprise of a private nature; and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people,—whether the act intended were of itself lawful or unlawful (*p*). 2. A *rout*, seems to be a disturbance of the peace by persons assembling together with an intention to do a thing which, if it be executed, will make them riotous, and actually making a motion towards the execution thereof (*q*). 3. An *unlawful assembly*, seems to consist of any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the peace, and raise fears and jealousies among the subjects of the realm (*r*). The punishment of a rioter

(*n*) Further provisions were made, by this statute, for the case of weapons being used or drawn in churches, &c.; but these were repealed by 9 Geo. 4, c. 31, s. 1.

(*o*) The 23 & 24 Vict. c. 32, imposes a penalty to the extent of 5*l.*, (or imprisonment to the extent of two months,) on the offence of riotous, violent, or indecent behaviour by any person in a church or place of worship, or in a churchyard or burial-ground; and also on the offence of molesting, troubling, misusing, &c. an authorized preacher, or clergyman in holy orders, in his celebration of any divine service or office in a church, &c.

(*p*) Hawk. P. C. b. 1, c. 66, s. 1; and see Cox *v.* Goodday, 2 Hagg. R. 139.

(*q*) Hawk. ubi sup. c. 65, s. 8.

(*r*) Ib. s. 9; and see 57 Geo. 3, c. 19, s. 23. With regard to an "unlawful assembly," it is said in the Report of the Criminal Code Bill Commission (p. 20) that the

is fine and imprisonment; and to this (by 3 Geo. IV. c. 114) hard labour may be superadded. The same punishment, but without this addition, attaches to the offences of routs and unlawful assemblies. [And by the statute 13 Hen. IV. c. 7, any two justices, together with the sheriff or undersheriff of the county, may come with the *posse comitatus*, (if need be,) and suppress any such riot, assembly or rout; arrest the rioters; and record, upon the spot, the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden, that all persons, noblemen, and others, (except women, clergymen, persons decrepit, and infants under fifteen,) are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment (*s*); and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable (*t*). So that our antient law, previous to the modern Riot Act about to be mentioned, seems pretty well to have guarded against any violent breach of the peace; especially since any riotous assembly on a public or general account, —as to redress grievances, or to pull down all inclosures, and also resisting the Royal forces if sent to keep the peace,—may amount to overt acts of treason by levying war against the sovereign (*u*).

But the riotous assembling of twelve persons or more, *and not dispersing upon proclamation*, is a much more serious

earliest definition thereof is to be found in the year book, 21 Hen. 7, 39, and, it is added, "It would "seem that the law was first "adopted at a time when it was "the practice of the gentry who "were on bad terms with each "other to go to market at the head "of bands of armed retainers. It is "obvious that no civilized govern- "ment could permit this practice, "the consequence of which was at "the time that the assembled bands "would probably fight, and cer- "tainly make peaceable people fear "that they would fight."

(*s*) See R. *v.* Pinney, 3 B. & Ad. 946; R. *v.* Neale, 9 C. & P. 431; R. *v.* Brown, 1 Car. & M. 315.

(*t*) 1 Hale, P. C. 495; Hawk. P. C. b. 1, c. 65, s. 20.

(*u*) Vide sup. p. 170.

[offence than to be engaged in an ordinary riot as above defined, which amounts to a misdemeanor only. For that which is now under consideration was made treason by statute 3 & 4 Edw. VI. c. 5; when the king was a minor and a change of religion to be effected. And though that statute was repealed by the first Act of Queen Mary among the other treasons created since the twenty-fifth year of Edward the third, the prohibition was in substance re-enacted, with an inferior degree of punishment, by statute 1 Mar. sess. 2, c. 12; which made the same offence a simple felony. The statutes particularized the nature of the riots they were meant to suppress; as, for example, such as were set on foot with intention to offer violence to the Privy Council; or to change the laws of the kingdom; or for certain other specified purposes. In which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of Mary made felony, but within the benefit of clergy; and also the Act indemnified the peace officers and their assistants, if they killed any of the mob in endeavouring to suppress such riot. This was thought a necessary security in that sanguinary reign when popery was intended to be established, which was like to produce great discontents: but at first it was made only for a year, and was afterwards continued for that queen's life. And by statute 1 Eliz. c. 16, when a reformation in religion was to be once more attempted, it was revived and continued during her life also, and then expired. From the accession of James the first to the death of Queen Anne, it was never once thought expedient to revive it; but in the first year of George the first, it was judged necessary, in order to support the execution of the Act of Settlement, to renew it; and at one stroke to make it perpetual, with large additions. For whereas the former Acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. I. st. 2, c. 5, commonly called "the Riot Act," enacts generally, that if any twelve persons are unlawfully

[assembled to the disturbance of the peace; and any one justice of the peace, sheriff, under-sheriff or mayor of a town, shall think proper to command them by proclamation to disperse,—if they contemn his orders, and continue together for one hour afterwards, such contempt shall be felony:] and the punishment is penal servitude for life, or not less than five years; or imprisonment to the extent of two years with or without hard labour and solitary confinement (*u*). [The Riot Act declares further, that if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers, and all persons to whom such proclamation *ought to have been made*, and knowing of such hindrance, and not dispersing, are felons:] and they are liable to the like punishment (*v*). [The same Act also contains a clause indemnifying the officers and their assistants in case any of the mob be unfortunately killed in the endeavour to disperse them;—such clause being copied from the Act of Queen Mary.]

XXI. [Nearly related to this head of riots is the misdemeanor of *tumultuous petitioning;* which was carried to an enormous height, in the times preceding the grand rebellion. Wherefore by statute 13 Car. II. st. 1, c. 5, it was enacted, that not more than twenty names shall be signed to any petition to the Crown or either house of parliament for the alteration of matters established by law in Church or State: unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter sessions; and, in London, by the lord mayor, aldermen, and common council (*w*): and that no petition shall be delivered

(*u*) 1 Geo. 1, st. 2, c. 5; 7 Will. 4 & 1 Vict. c. 91; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

(*v*) Ibid.

(*w*) This may be one reason, says Blackstone (vol. iv. p. 147), why the corporation of London has, since

[by a company of more than ten persons. On pain, in either case, of incurring a penalty not exceeding 100*l.* and three months' imprisonment (*x*).]

Moreover, it was provided by 57 Geo. III. c. 19, s. 23, that it shall not be lawful for any person to convene, or give notice of convening, any meeting consisting of more than fifty persons, or for any number of persons exceeding the number of fifty, to meet in any street, square, or open space in the city or liberties of Westminster or county of Middlesex, within a distance of a mile from the gate of Westminster Hall, (except such parts of the parish of St. Paul's, Covent Garden, as are within such distance,)—for the purpose of considering of or preparing any petition, complaint, remonstrance, declaration or other address to both or either house of parliament for alteration of matters in Church or State,—on any day on which the two houses or either house of parliament shall meet and sit; or shall be summoned or adjourned or prorogued to meet or sit; or on any day on which the courts shall sit in Westminster Hall. And any such meeting is by the Act made an *unlawful assembly* (*y*). But there is a provision that the enactment shall not apply to any meeting for the election of members to serve in parliament, nor to persons attending upon the business of either house of parliament, or any of the said courts (*z*).

the Restoration, usually taken the lead in petitions to parliament for the alteration of any established law.

(*x*) At the trial of Lord George Gordon, it was held by the Court of Queen's Bench (see Dougl. Rep. 591), under the presidency of Lord Mansfield, that 13 Car. 2, st. 1, c. 5, was not affected by the declaration subsequently inserted into the Bill of Rights (1 W. & M. sess. 2, c. 2), that "the subject has a right to petition, and that all commitments and prosecutions for such petitions are illegal." However, the provisions of the Act have not been enforced in modern times, though on the other hand, at a season of great public excitement, fresh, though temporary, prohibitions as to meetings, for deliberations on public questions, were made by 60 Geo. 3 & 1 Geo. 4, c. 6.

(*y*) As to what this term imports vide sup. p. 213.

(*z*) As to this Act, see 1 Russ. on Crimes, p. 280.

XXII. [Another offence against the peace is that of a *forcible entry* or *detainer;* which is committed by violently taking,—or, after an unlawful taking, violently keeping possession of—lands and tenements, with menaces, force and arms, and without the authority of law (*y*). A forcible entry was formerly allowable to every person disseised or turned out of possession, unless his entry was taken away or barred by his own neglect or other circumstances; but it is now,—as well as a forcible detainer,—a misdemeanor, punishable by fine and imprisonment (*z*).

XXIII. The offence of *riding or going armed with dangerous or unusual weapons* is a misdemeanor, tending to disturb the peace, by terrifying the good people of the land; and it was particularly prohibited by the Statute of Northampton, (2 Edw. III. c. 3,) upon pain of forfeiture of the arms, and imprisonment during the pleasure of the Crown; in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour (*a*).

XXIV. *Spreading false news*, to make discord between the sovereign and nobility, or concerning any great man of the realm, is also said in the books to be a misdemeanor, punishable by common law with fine and imprisonment (*b*); and this is confirmed by statutes Westminster the first (3 Edw. 1, c. 34), 2 Ric. II. st. 1, c. 5, and 12 Ric. II. c. 11.

XXV. *False and pretended prophecies*, with intent to disturb the peace, are equally unlawful, as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. They, too, are said to be punishable as misdemeanors: and that upon the same principle that spreading of public news of any kind, without communi-

(*y*) See R. *v.* Oakley, 4 Barn. & Adol. 30; R. *v.* Wilson, 3 Ad. & El. 817; 1 Russ. on Crimes, p. 340.

(*z*) See 5 Ric. 2, st. 1, c. 7; 15 Ric. 2, c. 2; 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15.

(*a*) Pott. Antiq. b. 1, c. 26.

(*b*) 2 Inst. 226; 3 Inst. 198.

[cating it first to the magistrate, was prohibited by the antient Gauls (*c*). Indeed, the offence was made capital by 33 Hen. VIII. c. 14, though this was altered by 3 & 4 Edw. VI. c. 15, and 7 Edw. VI. c. 11 (*d*): and afterwards by the statute 5 Eliz. c. 15, the penalty for the first offence was made a fine of ten pounds and one year's imprisonment; and for the second, forfeiture of all goods and chattels and imprisonment during life (*e*).]

XXVI. We may observe here that besides actual breaches of the peace (of which enough has been said), any thing that tends to provoke or incite others to break it, is also an offence against public order. Therefore, *challenges to fight*, either by word or letter, or the bearing of such challenges, are misdemeanors, punishable by fine and imprisonment, according to the circumstances of the offence (*f*).

XXVII. We next come to consider a class of offences which are against public order when considered in its *external* aspect, and as provided for by the universal law of society, which regulates the mutual intercourse between one State and another. It will be found that practices repugnant to that law, are in some instances particularly animadverted on, as such, by the English law.

[The law of nations, to which we have before had occasion briefly to advert (*g*), is a system of rules, established by universal consent, among the civilized inhabitants of

(*c*) "*Habent legibus sanctum, si quis quid de republicâ a finitimis rumore aut famâ acceperit, uti ad magistratum deferat, neve cum alio communicet; quod sæpe homines temerarios atque imperitos falsis rumoribus terreri, et ad facinus impelli, et de summis rebus consilium capere, cognitum est.*" (Cæs. de Bell. Gall. lib. 6, cap. 19.)

(*d*) See Coleridge's Blackstone (vol. iv. p. 149), *in notis*, where Blackstone's statement on this subject is corrected.

(*e*) These antient statutes were all expressly repealed as obsolete by 26 & 27 Vict. c. 125, in the year 1863.

(*f*) Hawk. P. C. b. 1, c. 63, ss. 3, 21.

(*g*) Vide sup. vol. i. p. 24.

[the world (*h*); in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent States, and the individuals belonging to each: being founded upon this general principle, that different nations ought, in time of peace, to do to one another all the good they can: and in time of war, as little harm as possible, without prejudice to their own real interests. And as none of these States will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree, and to which all civilized States have assented.

In arbitrary States this law, whenever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but, since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations, whenever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and held to be the law of the land. Hence those Acts of Parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilized world. But though in civil transactions, and questions of property, between the subjects of different States, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our inquiries will fall within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular State. For offences against this law are princi-

(*h*) Sp. L. b. 1, c. 7.

[pally incident to whole States or nations; in which case recourse can only be had to war, which is an appeal to the God of hosts, to punish such infractions of public faith as are committed by one independent people against another; neither State having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any State violate this general law, it is then the interest, as well as duty, of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations, in their collective capacity, observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two States in a war. It is, therefore, incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the State to which he belongs; and if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war (*i*).]

The principal cases in which the statute law of England interposes to aid and enforce the law of nations, as a part of the common law, by inflicting an adequate punishment upon infractions of that universal law when committed by private persons, are in respect of offences of three kinds:

(*i*) It has not been thought convenient to disturb the general statement on this subject which is given in the text as originally laid down by Blackstone. But it may be worth notice here, that since his time attempts have more than once been made by international arrangements to refer such disputes, as are of a nature to admit of amicable settlement, to peaceful arbitration, in place of an appeal to war. Thus, in the year 1861, certain vessels, afterwards used against the United States by the Confederates of the South, having been built and equipped in this country, and allowed to escape from our ports, it was insisted by the United States that, not having used due diligence in the matter, we were liable for the damages they had sustained by the depredations of these ships. This question was by treaty referred to the arbitrament of certain of the European powers, and it was by them decided, at a sitting held at Geneva in the year 1872, that we were responsible for such damages to the extent of about three millions sterling.

the violation of safe-conducts; the infringement of the rights of ambassadors; and the crime of piracy.

[As to the *violation* of the *safe-conducts* or *passports*, expressly granted by the sovereign or his ambassadors, to the subjects of a foreign power, in time of mutual war; or the committing acts of hostility against such as are in amity, league, or truce with us, who are, in this case, under a general implied safe-conduct;—these are breaches of the public faith, without the preservation of which, there can be no intercourse or commerce between one nation and another. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and more especially as it is one of the articles of *Magna Charta*, that foreign merchants shall be entitled to safe-conduct and security throughout the kingdom (*i*);—there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the sovereign; whose honour is more particularly engaged in supporting his own safe-conduct (*k*). And when this malicious rapacity was not confined to private individuals, but broke out into general hostilities,—then, by the statute 2 Hen. V. st. 1, c. 6, the breaking of truce and safe-conducts, or abetting and receiving the truce-breakers, was (in affirmance and support of the law of nations) declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts were appointed in every port, and empowered to hear and determine such treasons when committed at sea, according to the antient marine law then practised in the admiral's court. Which statute, so far as it made these offences amount to treason, was suspended by 14 Hen. VI. c. 8, and repealed by 20 Hen. VI. c. 11; but it was revived by 29 Hen. VI. c. 2, which gave the same powers to the lord chancellor asso-

(*i*) 9 Hen. 3, c. 30.

(*k*) As to safe-conducts, vide sup. vol. II. p. 495.

[ciated with either of the chief justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects, prior to any claim of the Crown. And it was further enacted by the statute 31 Hen. VI. c. 4, that if any of the king's subjects offend, upon the sea or in any port within the king's obeisance, against any stranger in amity, league or truce, or under safe-conduct,—and especially by attacking his person, or spoiling him or robbing him of his goods; —the lord chancellor, (with any of the justices of either the King's Bench or Common Pleas,) may cause full restitution and amends to be made to the party injured.

It is to be observed, that the suspending and repealing Acts of the fourteenth and twentieth years of Henry the sixth, and also the reviving Act of the twenty-ninth of the same monarch, were only temporary; so that it should seem that, after the expiration of them all, the statute of the second year of Henry the fifth continued in full force: but yet it is considered as extinct by the statute 14 Edw. IV. c. 4; which revives and confirms all statutes and ordinances made before the accession of the house of York, against breakers of amities, truces, leagues, and safe-conducts, with an express exception of the statute of 2 Hen. V. st. 1, c. 6. And however that may be, this statute was finally repealed by the general statutes of Edward the sixth, and Queen Mary, for abolishing new created treasons (*l*); though Sir Matthew Hale seems to question it, as to treason committed on the sea (*m*).] As to the statute of 31 Hen. VI. c. 4, it remained in our statute book till the year 1863, when it was repealed as obsolete.

The rights of *ambassadors* have formerly been treated of at large, in that part of this work in which we discussed the nature and extent of the royal prerogative. And it may be recollected, that any violation of them amounts, by

(*l*) As to these statutes, vide sup. p. 175, and 4 Bl. Com. p. 70.

(*m*) 1 Hale, P. C. 267.

express legislative enactment, to a crime of a highly penal nature (*n*).

[The crime of *piracy*, (or robbery and depredation upon the high seas,) is an offence against the universal law of society (*o*); a pirate being, according to Sir Edward Coke, *hostis humani generis* (*p*). As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would, in a state of nature, have been otherwise entitled to do, for any invasion of his person or personal property.

By the antient common law, piracy if committed by an alien was felony, but if by a subject, was held to be a species of treason, being contrary to his natural allegiance; but now, since the statute of treasons, 25 Edw. III. st. 5, c. 2, it is held to amount only to an ordinary felony (*p*). At the common law, it consisted in committing those acts of robbery and depredation upon the high seas, or other places where the admiralty has jurisdiction, which, if committed upon land, would have amounted to felony there (*q*). But, by statute, some other offences have been made piracy also; as, by stat. 11 Will. III. c. 7, if any natural-born subject commits any act of hostility upon the high seas, against others of her majesty's subjects, under colour of a commission from any foreign power; this, though it would be only an act of war in an alien, shall be construed piracy in a subject. And further (by the same Act), any commander, or other

(*n*) Vide sup. vol. II. p. 491.

(*o*) See 41 & 42 Vict. c. 73, s. 6. It is observed in the Report of the Criminal Code Bill Commission (p. 19) that piracy and piratical offences are offences against *public order*, "because they are in the nature "of private war waged against the "lawful authority of all nations."

(*p*) 3 Inst. 113.

(*q*) Hawk. P. C. b. 1, c. 37. As to the admiralty jurisdiction, vide sup. vol. I. p. 115.

[seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition or goods; or yielding them up, voluntarily, to a pirate; or conspiring to do these acts;—or any person assaulting the commander of a vessel to hinder him from fighting his ship, or confining him, or making or endeavouring to make a revolt on board, shall be adjudged a pirate, felon, and robber (*r*). Again, by the statute 8 Geo. I. c. 24, (made perpetual by 2 Geo. II. c. 28, s. 7,) the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in anywise consulting, combining, confederating, or corresponding with them; or the forcibly boarding any merchant vessel, (though without seizing or carrying her off,) and destroying or throwing any of the goods overboard;—was declared to be piracy. Moreover, by statute 18 Geo. II. c. 30, any natural-born subject or denizen, who in time of war shall commit hostilities at sea against any of his fellow subjects, or shall assist an enemy on that element,—is liable to be tried and convicted as a pirate (*s*).] And, lastly, in our own times, a further addition has been made to the list of piratical offences. For, with a view of putting an effectual stop to the slave trade, the statute 5 Geo. IV. c. 113 (*t*), enacts, that if any British subject, wherever residing,—and whether within the dominion of Great Britain, or of any foreign country, or in the colonies,—shall (except in some particular cases therein specified), within the jurisdiction of the

(*r*) See R. *v.* M'Gregor, 1 Car. & Kir. 430; R. *v.* Hastings, 1 M. C. C. R. 82.

(*s*) Blackstone remarks (vol. iv. p. 73), that, under the statutes relating to piracy, commanders or seamen wounded, and the widows of seamen slain in any engagement with pirates, are entitled to a bounty to be divided amongst them, not exceeding one-fiftieth part of the value of the cargo on board. And further, that if the commander displays cowardice, he shall forfeit all his wages, and suffer six months' imprisonment. As to the condemnation in the Court of Admiralty of ships and goods taken from pirates, and the salvage payable by the owners, vide sup. vol. II. p. 17.

(*t*) See also the enactments in repression of the slave trade, cited vol. I. p. 109, n. (*t*).

admiralty, knowingly convey or assist in conveying, persons as slaves, or to be dealt with as slaves, or ship them for that purpose, he shall be deemed guilty of piracy, felony and robbery (*u*).

Formerly the punishment for most piratical offences was death. But it has been thought expedient to relax this severity; and, now, whoever shall be convicted of piracy, is liable to be sentenced to penal servitude for life or any term not less than five years; or to be imprisoned, (with or without hard labour,) for any term not more than two years (*x*). But, whoever, with intent to commit, or at the time of or immediately before or after committing, the crime of piracy, shall assault with intent to murder, or stab or wound, or unlawfully do any act by which the life of any person on board of or belonging to any ship or vessel may be endangered,—is liable to suffer death as a felon (*y*).

(*u*) See R. *v.* Zulueta, 1 Car. & Kir. 215; Buron *v.* Denman, 2 Exch. 167.

(*x*) 5 Geo. 4, c. 113; 7 Will. 4 & 1 Vict. c. 88; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

(*y*) 7 Will. 4 & 1 Vict. c. 88, s. 2, As to the general law with respect to wounding, &c. with intent to murder, vide sup. pp. 78, 79. The Report of the Criminal Code Bill Commission (p. 20) points out that though piracy is punishable with death if accompanied by personal violence, sentence of death may be *recorded*, instead of being pronounced in open court, and the effect of this is to save the offender's life.

CHAPTER VII.

OF OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

It was laid down at the outset of this work that *rights* are liberties secured to the individual by the compact of civil society (*a*); and at the beginning of our present division we defined *crimes* as the violation of rights when considered in a particular point of view, viz. in reference to the evil effect of such violation as regards the community at large (*b*). It follows from this, that crimes, in contemplation of law, essentially consist in the breach of human institutions: and therefore, though some of the offences treated of in this chapter are enumerated as offences against religion, yet in a treatise of municipal law, we must consider them as deriving their particular guilt from the law of man.

Of those offences against religion of which cognizance is thus taken by human tribunals, the first we will notice is that of—

I. [*Apostasy*, or a total renunciation of Christianity, by embracing either a false religion or no religion at all. This offence can only take place, in such as have once professed the true religion. The perversion of a Christian to judaism, paganism, or other false religion, was punished by the Emperors Constantius and Julian with confiscation of goods (*c*); to which the Emperors Theodosius and Valentinian added capital punishment, in case the apostate endeavoured to pervert others to the same iniquity (*d*):

(*a*) Vide sup. vol. 1. p. 29.
(*b*) Vide sup. p. 4.
(*c*) Cod. 1. 7, 1.
(*d*) Cod. 6.

[a punishment too severe for any temporal laws to inflict upon any spiritual offence: and yet the zeal of our ancestors imported it into this country; for we find by Bracton, that in his time apostates were to be burnt to death (*e*). Doubtless the preservation of Christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the state; and therefore all endeavours to depreciate its efficacy in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier penalty than the offence, taken in a civil light, deserves; and taken in a spiritual light, our laws have no jurisdiction over it. This punishment, therefore, has long ago become obsolete; and the offence of apostasy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animæ*. But about the close of the sixteenth century the civil liberties to which we were then restored, being used as a cloak of maliciousness; and the most horrid doctrines, subversive of all religion, being publicly avowed, both in discourse and writings, it was thought necessary again for the civil power to interpose, by not admitting those *miscreants* to the privileges of society, who maintained such principles as destroyed all moral obligation (*f*).] To this end it was enacted by stat. 9 Will. III. c. 35, that if any person educated in, or having made profession of, the christian religion, shall by writing, printing, teaching, or advised speaking, assert or maintain there are more Gods than one, or shall deny the christian religion to be true (*g*), or the holy scripture of the old and new testament to be of divine authority, he shall upon the first offence be rendered incapable to

(*e*) L. 3, c. 9.

(*f*) *Mescroyantz* in our antient law books is the name of unbelievers.

(*g*) The Act (in some editions of the statutes printed cap. 32) adds to these offences, that of denying "any one of the persons in the Holy Trinity to be God," but it was repealed, *quoad hoc*, by 53 Geo. 3, c. 160. (See Rex *v.* Waddington, 1 Barn. & Cres. 26.)

hold any ecclesiastical, civil or military office or employment; and for the second, be rendered incapable of bringing any action, (or to be guardian, executor, legatee, or donee,) and shall suffer three years' imprisonment without bail. To give room, however, for repentance;—if, within four months after the first conviction, the delinquent will in the court in which he was convicted renounce his error, he is discharged for that once from all penalties and disabilities.

II. A second offence is that of *heresy;* which consists not in a total denial of Christianity, but in the public and obstinate denial of some of its principal doctrines (*h*).

[Heresy was described among the canonists, in vague and general terms, as consisting of any deviation from the true Catholic faith, as understood by Holy Mother Church (*i*),—very contrary to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness (*j*); and spoke of heretics by name, as in the case of the Manichæans, Nestorians, and others (*k*). The cognizance of heresy has always been held in every country, where the canon law has prevailed, to belong to the ecclesiastical judge (*l*); and the canonists have ever treated it with great severity. On the continent, they prevailed upon the weakness of bigoted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence: the Romish ecclesiastics determining without appeal whatever they pleased to be heresy; and shifting off to the secular arm the odium and drudgery of executions, with which they themselves were too tender and delicate to intermeddle. Nay, they pretended to

(*h*) 1 Hale, P. C. 384.

(*i*) "*Hæreticus, qui de articulis fidei aliter prædicat, sentit, vel docceat, quàm docet sancta mater ecclesia.*"—See 1 Hale, P. C. 383.

(*j*) 4 Bl. Com. p. 45.

(*k*) See Hale, ubi sup.

(*l*) Year Book, 27 Hen. 8, 14 b; stat. 2 Hen. 4, c. 15; Hale, ubi sup.; Bl. Com., ubi sup.

[intercede and pray on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderetur* (*m*), well knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the ancient Donatists and Manichæans, by the Emperors Theodosius and Justinian (*n*): hence also the constitution of the Emperor Frederic, mentioned by Lyndewode (*o*): adjudging all persons without distinction to be burned by fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution, ordained that if any temporal lord, when admonished by the Church, should neglect to clear his territories of heretics within a year, it should be lawful for good Catholics to seize and occupy the lands, and utterly to exterminate the heretical possessors (*p*). And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the Pope, of disposing even of the kingdoms of refractory princes, to more dutiful sons of the Church. The immediate event of this constitution was somewhat singular, and may serve to illustrate at once the gratitude of the holy see and the just punishment of the royal bigot,—for upon the authority of this very constitution the Pope afterwards expelled this very Emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou (*q*).

Christianity being thus deformed by the demon of persecution upon the continent, we cannot expect that our own island should have been entirely free from the same scourge.] And accordingly we not only find that our ecclesiastical courts were always in the habit of proceeding against heretics by spiritual punishments, such as penance, excommunication and the like; but we also discover among our antient precedents a writ *de hæretico com-*

(*m*) Greg. Decret. lib. 5, t. 40, c. 27.
(*n*) Cod. 1. i. tit. 5.
(*o*) C. de Hæreticis.
(*p*) Cod. 1, 5, 4.
(*q*) Baldus in Cod. 1, 5, 4.

burendo, which is thought by some to be as antient as the common law itself (*r*). However, it appears that it was not the practice to issue this writ except upon a conviction for contumacy or relapse; nor unless such conviction took place before the archbishop himself in a provincial synod or convocation. And even that authority could not lawfully award the writ, but merely left the delinquent to the secular power: so that the crown might pardon him, if it thought proper, by forbearing to issue the writ; which was not grantable as of course, but issued by the special direction of the sovereign (*s*). [But in the reign of Henry the fourth, when the eyes of the Christian world began to open, and the seeds of the Protestant religion—though under the opprobrious name of Lollardy (*t*)—took root in this kingdom, the clergy, taking advantage, from the king's dubious title, to demand an increase of their own power, obtained an act of parliament (2 Hen. IV. c. 15), which sharpened the edge of persecution to its utmost keenness (*u*). For by that statute the diocesan alone, without the intervention of a synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if,

(*r*) 1 Hale, P. C. 392; 1 Hawk. b. 1, c. 2, s. 10; and see St. Tr. vol. ii. 275. It seems clear, however, that, at common law, heresy was not punishable by forfeiture of lands or goods. See 1 Hale, P. C. 388 (n).

(*s*) 1 Hale, P. C. 385, 393, 395. According to some opinions, the writ *de hæretico comburendo* was, at common law, not only in *practice* confined to convictions before the archbishop in provincial synod, but could not *legally* be awarded on a conviction before any court of inferior authority, such as that of the diocesan. See 1 Hale, P. C. 391; 12 Rep. 56, 57.

(*t*) So called not from *lolium* or tares (an etymology which was afterwards devised in order to justify the burning of them, as sanctioned by Matth. xiii. 30), but from one Walter Lolhard, a German reformer, A.D. 1315 (Mod. Un. Hist. xxvi. 13; Spelm. Gloss. 371); or, as some hold, from *Lollen*, to sing, in reference to their psalm-singing. (D'Aubigné, Hist. of Reformation, vol. v. p. 130.)

(*u*) A previous Act (5 Ric. 2, st. 2, c. 5,) had been aimed at the followers of Wickliffe, but the people would not assent to it, and it was revoked the following year. (See Hist. Eng. L. by Reeves. vol. iii. p. 163.)

[after abjuration, he relapsed, the sheriff was bound, *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. And again, by the stat. 2 Hen. V. st. 1, c. 7, Lollardism was also made a temporal offence, and indictable in the king's courts; which did not however thereby gain an exclusive but only a concurrent jurisdiction with the bishop's consistory.

Afterwards, as the reformation of religion advanced, the power of the ecclesiastics became somewhat moderated; for though in what heresy consisted was still not precisely defined, yet the legislature explained in some points what it was *not*. For the statute 25 Hen. VIII. c. 14, declared that offences against the see of Rome were not heretical; and restrained the ordinary from proceeding in any case of alleged heresy upon mere suspicion,—that is, unless the party was accused by two credible witnesses, or an indictment for the offence was first found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31 Hen. VIII. c. 14, the bloody law of the Six Articles was made; which established the six most contested points of popery—transubstantiation —communion in one kind—the celibacy of the clergy—monastic vows—the sacrifice of the mass—and auricular confession; which points were "determined and resolved by "the most godly study, pain and travail of his majesty; for "which his most humble and obedient subjects, the lords "spiritual and temporal, and the commons, in parliament "assembled, did not only render and give unto his high-"ness their most high and hearty thanks," but did also enact and declare all oppugners of the first to be heretics, and to be burned with fire,—and of the five last, to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supre-

[macy of the bishops of Rome, and establishing all other their corruptions of the Christian religion.

We shall not enter into the various repeals and revivals of these sanguinary laws in the two succeeding reigns; but shall proceed directly to the reign of Queen Elizabeth, when the Reformation was established on a firm and permanent basis. By stat. 1 Eliz. c. 1, all former statutes relating to heresy were repealed, which left the jurisdiction of heresy as it stood at common law; that is, left the simple offence to be visited by spiritual punishments in the ecclesiastical courts; and the offence, when aggravated by contumacy or relapse, to be dealt with by the writ *de hæretico comburendo*, after a conviction in the provincial synod. But the principal point then gained was, that by this statute a boundary was for the first time set to what would be accounted heresy; that is to say, such tenets only as had been theretofore so declared, 1, by the words of the Canonical Scriptures, or 2, by the first four general councils, or such others as had only used the words of the Holy Scriptures: or which should thereafter be declared heresy by the parliament, with the assent of the clergy in convocation.

The writ, however, *de hæretico comburendo* still remained in force: and we have instances of its being put in execution upon two Anabaptists in the seventeenth year of Elizabeth, and upon two Arians in the ninth year of James the first. But that writ was totally abolished, and heresy at length again subjected only to ecclesiastical correction *pro salute animæ*, by virtue of the statute 29 Car. II. c. 9.

III. Another species of offences against God and religion, is that of *blasphemy* against the Almighty by denying His being or providence; or by contumelious reproaches of our Lord and Saviour Christ: whither, also, may be referred all profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule. These are offences

[punishable at common law by fine and imprisonment, or other infamous corporal punishment (*x*). For Christianity is part of the laws of England; and a blasphemous libel may (as noticed elsewhere) be prosecuted as an offence at common law, and punished with fine and imprisonment (*y*).]

IV. A fourth species of offences against religion are those which affect the Established Church. And these have been said to be either positive or negative: positive, by reviling its ordinances; or negative, by non-conformity to its worship (*z*). But we shall confine our remarks to the former class: the latter being in effect abolished by the gradual extension of the principle of religious toleration; the history of which has been already traced in that part of this work where we had occasion to consider the Church and its worship (*a*).

[As to the offence of *reviling the ordinances of the Church*, this is a crime which carries with it the utmost indecency, arrogance, and ingratitude; indecency by setting up private judgment in virulent and factious opposition to public authority; arrogance, by treating with contempt and rudeness, what has at least a better chance to be right than the singular notions of any particular man; and ingratitude, by denying that indulgence and undisturbed liberty of conscience to the members of the national Church, which the retainers to every petty conventicle enjoy. And, accordingly, it was provided by statute 1 Edw. VI. c. 1, and 1 Eliz. c. 1, that whoever reviled

(*x*) Hawk. P. C. b. 1, c. 5, s. 5.

(*y*) Vide sup. p. 100, note (*t*). Hawk. ubi sup.; 1 Vent. 293; R. *v.* Woolston, Str. 834; R. *v.* Carlisle, 3 B. & Ald. 161. In the thirty-fourth year of Henry the sixth, Chief Justice Prisot declared in the Court of Common Pleas,—"*Scripture est common ley, sur quel touts manieres de leis sont fondés.*" (See the Year Book, 34 Hen. 6, 40.) And that Christianity is part of the law of England, is again judicially asserted in the judgment of Chief Baron Kelly, in the case of Cowan *v.* Milbourne, Law Rep., 2 Exch. 230.

(*z*) 4 Bl. Com. p. 50.

(*a*) Vide sup. vol. II. p. 709.

[the sacrament of the Lord's Supper shall be punished by fine and imprisonment. And by the statute 1 Eliz. c. 2, that if any *ordained minister* shall speak any thing in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second: and, if beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second offence be deprived, and suffer one year's imprisonment; and, for the third, be deprived, and suffer imprisonment for life. The same Act provided also, that if *any* person shall in plays, songs, or other open words, speak any thing in derogation, depraving or despising of the said book of prayer, or forcibly prevent the reading of it, or cause any other service to be used in its stead,—he shall forfeit, for the first offence, a hundred marks; for the second, four hundred: and, for the third, all his goods and chattels, and suffer imprisonment for life. These penalties were framed in the infancy of our present establishment, when the disciples of Rome and Geneva united in inveighing with the utmost bitterness against the english liturgy, and the terror of these laws (for they seldom, if ever, were fully executed) proved a principal means, under providence, of preserving the purity as well as decency of our national worship. Nor can the milder penalties, at least, provided by these enactments be thought too severe and intolerant; so far as they are levelled at the offence, not of *thinking* differently from the national Church, but of *railing* at that Church and *obstructing* its ordinances. For though it is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate (*b*).

V. Another offence against God and religion is that of profane and common *swearing* and *cursing*. And by

(*b*) See also the provisions contained in 9 Will. 3, c. 35, sup. p. 228.

[19 Geo. II. c. 21, which repealed all former statutes on this subject, every labourer, sailor, or soldier profanely cursing or swearing, shall forfeit one shilling (*c*); every other person, under the degree of a gentleman, two shillings; and every gentleman or person of superior rank, five shillings; to the poor of the parish wherein such offence was committed (*d*). And, on a second conviction, shall forfeit double, and for every subsequent offence, treble, the sum first forfeited, with all charges of conviction; and, in default of payment, shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing or the testimony of one witness. And any constable or peace officer, upon his own hearing, may secure the offender and carry him before a justice, and there convict him; but the conviction must be within eight days after the committal of the offence. If the justice omits his duty, he forfeits five pounds, and the constable forty shillings.]

VI. Another offence of the description under consideration, is that of *using pretended witchcraft, conjuration, enchantment, and sorcery.* Our law once included in the list of crimes, that of *actual* witchcraft or intercourse with evil spirits: and though it has now no longer a place among them, its exclusion is not to be understood as implying a denial of the possibility of such an offence. [To deny this, would be to contradict the revealed word of God in various passages both of the Old and New Testament; and the thing itself is a truth to which every nation in the world hath in its turn borne testimony; either by examples seemingly well attested, or by prohibitory laws, which at least suppose the possibility of a commerce with evil spirits.

(*c*) It also forms one of the articles of war contained in the Naval Discipline Act, 1866, that any person subject to that Act, who shall be guilty of profane swearing, shall be dismissed her majesty's service with disgrace, or suffer such lesser punishment as by that Act authorized. (29 & 30 Vict. c. 109, s. 27.)

(*d*) See a modern prosecution under this enactment, The Queen *v.* Scott, 4 B. & Smith, 368.

[Wherefore it seems to be the most eligible way to conclude, with an ingenious writer, that in general there has been such a thing as witchcraft, though one cannot give credit to any particular modern instance of it (*e*).

Our forefathers, however, were stronger believers when they enacted, by statute 33 Henry VIII. c. 8, all witchcraft and sorcery to be felony without benefit of clergy. And again by statute 1 Jac. I. c. 12, that all persons invoking any evil spirit; or consulting, covenanting with, entertaining, employing, feeding or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm or enchantment; or killing or otherwise hurting any person by such infernal arts;—should be guilty of felony and suffer death: and that if any person should attempt, by sorcery, to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, (though the same were not effected,) he, or she, should suffer imprisonment and pillory for the first offence, and death for the second. These Acts long continued in force, to the terror of all antient females in the kingdom: and many poor wretches were sacrificed thereby to the prejudice of their neighbours and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. But all prosecutions for this dubious crime are now at an end: our legislature having at length followed the wise example of Louis the fourteenth in France; who thought proper by an edict to restrain the tribunals of justice from receiving informations of witchcraft (*f*). And accordingly it was enacted, by 9 Geo. II. c. 5, that no proceeding for the future shall be carried on against any person for witchcraft, sorcery, enchantment, or conjuration; or for charging another with any such offence.] But, by the same statute, persons who pretend to use witchcraft, tell fortunes, or discover stolen goods by skill in any occult or crafty

(*e*) Mr. Addison, Spect. No. 117. c. 29; Mod. Un. Hist. xxv. 215.
(*f*) Voltaire, Siècl. Louis 14,

science—were made punishable by imprisonment: and by 5 Geo. IV. c. 83, s. 4, any person who shall use subtle craft, means, or device, by palmistry (*g*) or otherwise, to deceive the lieges,—is to be deemed a *rogue* and a *vagabond;* and may be punished with imprisonment and hard labour (*h*).

VII. [A seventh species of offenders in this class, are all *religious impostors;* such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment (*i*).]

VIII. *Simony* may also be considered as an offence against religion, by reason of the sacredness of the charge which is thereby profanely bought and sold. Its nature and the penalties to which it is subject having been already described, when we treated of the endowments and provisions of the Church (*k*), it will be unnecessary to recur to them in this place, and we shall pass on to consider—

IX. [*Profanation of the Lord's Day*, (commonly, but improperly, called *sabbath breaking*,) which is another offence of the class now in question. It is unquestionable that the keeping one day in seven holy, as a time of relaxation and refreshment, as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity, and savage selfishness of spirit. It enables the industrious workman to pursue his occupation in the ensuing week

(*g*) See Monck *v.* Hilton, Law Rep., 2 Ex. D. 268.

(*h*) As to *rogues and vagabonds*, vide post, p. 257.

(*i*) Hawk. P. C. b. 1, c. 5, s. 3.

(*k*) Vide vol. II. pp. 721—724.

[with health and cheerfulness; and it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and effaced by an unremitted continuance of labour without any stated times of recalling them to the worship of their Maker. Accordingly, the laws of King Athelstan forbade all merchandizing on the Lord's day, under very severe penalties (*l*); and by the statute 27 Henry VI. c. 5, no fair or market shall be held on Good Fridays or on any Sunday, except the four Sundays in harvest or for necessary victual, on pain of forfeiting the goods exposed to sale (*m*). Again, by statute 1 Car. I. c. 1, no persons shall assemble, out of their own parishes, for any sport whatever upon this day; nor in their parishes shall use any bull, or bear, baiting, interludes, plays, or other *unlawful* exercises or pastimes,—on pain that every offender shall pay three shillings and fourpence to the poor.] Also, by statute 29 Car. II. c. 7, no tradesman, artificer, workman, labourer, or other person whatever, is allowed to do any work of their ordinary calling upon the Lord's day,—works of necessity and charity only excepted,—on pain that every person, of fourteen years, so offending, shall forfeit five shillings. And, by the same Act, no person shall publicly expose to sale any wares whatever upon the Lord's day, upon pain of forfeiting the goods; nor any drover, or the like, travel or come into his inn or lodging, upon pain of forfeiting twenty shillings; nor any person serve or execute any process, (except for treason, felony or breach of the peace): and such service or execution, if made, shall be void to all intents and purposes whatever (*n*). Moreover, by 21 Geo. III. c. 49, any house

(*l*) C. 24.

(*m*) The exception as to Sundays in harvest time is repealed by 13 & 14 Vict. c. 23.

(*n*) By the 34 & 35 Vict. c. 87 (continued by the 42 & 43 Vict. c. 67, to 31st December, 1880), no prosecution under this statute of Car. 2 is to be instituted unless by the written consent of the chief officer of police, or of two justices, or a stipendiary magistrate. There are also enactments with the same object of securing the proper ob-

which shall be used for public entertainment or public debate on the Lord's day, and to which persons shall be admitted by the payment of money, shall be deemed a *disorderly house* (*o*): and subject to the punishment which the law provides in the case of houses of that description (*p*). And, lastly, there are enactments prohibiting under a penalty the sale of intoxicating liquors in public-houses and other licensed premises within certain hours, on any Sunday, Christmas-day, or Good Friday, unless to a lodger in the house, or to a *bonâ fide* traveller (*q*).

X. The offences already noticed are against religion, so far as its outward forms come within the sanction of municipal law; but before we proceed to other offences ranging themselves under the general heading of this chapter, we must notice as an offence against morals [the infamous *crime against nature*, committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that (as observed elsewhere in reference to the crime of rape) the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself (*r*).

servance of Sunday, which refer to *carriers* (3 Car. 1, c. 2); to *fish-carriages* (2 Geo. 3, c. 15); to *bakers* (34 Geo. 3, c. 61; 50 Geo. 3, c. 73, s. 3; 1 & 2 Geo. 4, c. 50, s. 11; 3 Geo. 4, c. cxvi, s. 16); to *watermen* (11 Will. 3, c. 24, s. 13; 7 & 8 Geo. 4, c. lxxv); to *killing game* (1 & 2 Will. 4, c. 32, s. 3). And see, as to the construction of statute 29 Car. 2, c. 7, Sandiman *v.* Breach, 7 Barn. & Cress. 96; R. *v.* Whitnash, ib. 596; Peate *v.* Dicken, 5 Tyr. 116; Scarfe *v.* Morgan, 1 H. & H. 292; Beaumont *v.* Brengeri, 5 C. B. 301.

(*o*) As to remitting penalties and forfeitures incurred under this Act, see 38 & 39 Vict. c. 80, and the following cases—Terry *v.* Brighton Aquarium Co., Law Rep., 10 Q. B. 306; Warner *v.* The same, ib. 10 Exch. 291.

(*p*) As to disorderly houses, vide post, p. 245. As to the construction of this enactment in reference to the holding of religious services, the admission to which is *by money*, see Baxter *v.* Langley, Law Rep., 4 C. P. 21.

(*q*) See 37 & 38 Vict. c. 49, s. 3.

(*r*) Vide sup. p. 89.

[We will not act so disagreeable a part as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more expedient to imitate in this respect the delicacy of our English law, which treats it as a crime not fit to be named; "*peccatum illud horribile, inter Christianos non nominandum*" (*s*). A taciturnity observed likewise by the edict of Constantius and Constans; "*ubi scelus est id quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis pœnis subdantur infames qui sunt, vel qui futuri sunt, rei*" (*t*).]

In our own country this offence, (being in the times of popery only subject to ecclesiastical censures,) was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6, (revived and confirmed by 5 Eliz. c. 17), and until very recently remained a capital offence (*u*). It is, however, now enacted by 24 & 25 Vict. c. 100, s. 61, that every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be kept in penal servitude for life, or not less than ten years. And the rule of law herein is, that, if both are arrived at years of discretion, *agentes et consentientes pari pœnâ plectantur* (*x*). Moreover, whosoever shall *attempt* to commit this crime, or shall be guilty of an assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, punishable with penal servitude for ten or not less than five years, or imprisonment, with or without hard labour, not exceeding two years (*y*).

(*s*) See in Rot. Parl. 50 Edw. 3, n. 58, a complaint that a Lombard did commit the sin "that was not to be named." (12 Rep. 37.)

(*t*) Cod. 2, 9, 31.

(*u*) It was capital under 9 Geo. 4, c. 31, now repealed by 24 & 25 Vict. c. 95. Its punishment (says Blackstone, vol. iv. p. 216) "the "voice of nature and of reason, "and the express law of God "(Levit. xx. 13, 15), determine to "be capital; of which we have a "signal instance, long before the "Jewish dispensation, by the de-"struction of two cities by fire "from heaven."

(*x*) 4 Bl. Com. 216; 3 Inst. 59.

(*y*) 24 & 25 Vict. c. 100, s. 62; 27 & 28 Vict. c. 47. It is to be noticed that by 22 & 23 Vict. c. 17, and 30 & 31 Vict. c. 35,

XI. Arriving, now, at those offences (of a miscellaneous description) which militate in one way or another against public convenience,—we shall here refer to the *sale of unwholesome and adulterated provisions* and to some other practices savouring of dishonesty, which are injurious to the community. [As to the sale of provisions, so long ago as the statute 51 Hen. III. st. 6, the sale of contagious or unwholesome *flesh*, or flesh bought of a Jew—was prohibited under pain of amercement, fine and imprisonment, and abjuration of the town, according to the frequency of the offence (*z*). By the statute 12 Car. II. c. 25, any adulteration of *wine* was made punishable with the forfeiture of 100*l.* if done by the wholesale merchant, and 40*l.* if done by the vintner or retail trader; on which subject, additional regulations were made by 1 W. & M. c. 34 (*a*).] By 3 Geo. IV. c. cvi., and 6 & 7 Will. IV. c. 37, special provisions have been made against the adulteration of *bread*, *corn*, *meal* or *flour* (*b*). Enactments with regard to the inspection of meat and other articles of consumption *offered for sale*, and (if need be) for the destruction of what is diseased or unsound or unfit in any way for the

provisions are made by which, in some cases, before an indictment for an indecent assault can be preferred to or found by the grand jury, security must be given for the due prosecution of the charge.

(*z*) As to this statute, see Burnby *v.* Bollett, 16 Mee. & W. 644. It is not printed in the Revised Statutes, but appears in some editions under the title of "*Judicium Pillorie.*"

(*a*) Both 12 Car. 2, c. 25, and 1 W. & M. c. 34, have been now expressly repealed as obsolete.

(*b*) See Robinson *v.* Clift, Law Rep., 1 Ex. D. 294; Aërated Bread Company *v.* Gregg, ib. 8 Q. B. 355. See also 32 & 33 Vict. c. 112; 41 & 42 Vict. c. 17; and Francis *v.* Maas, Law Rep., 3 Q. B. D. 341, as to the adulteration of *seeds*. As to 6 & 7 Will. 4, c. 37, see Jones *v.* Huxtable, Law Rep., 2 Q. B. 460; The Queen *v.* Wood, ib. 4 Q. B. 354; Hill, app., Browning, resp., ib. 5 Q. B. 453; Cox *v.* James, ib. 7 Q. B. 135. We are told by Blackstone (vol. iv. p. 168), that the punishment of *bakers* for offences relating to bread was antiently to stand in the pillory; and for *brewers*, for offences relating to beer, to stand in the tumbrel, or dung cart, "which, "as we learn from Domesday Book, "was the punishment for knavish "brewers in the city of Chester, "so early as the reign of Edward "the Confessor: '*Malam cervisiam* "*faciens, in cathedrâ ponebatur ster-* "*coris.*'"

food of man, are contained in the Public Health Act, 1875 (*c*). And now a fresh statute on the subject of adulteration, viz., the 38 & 39 Vict. c. 63, provides generally (*d*), first, that no person shall mix, colour, stain or powder any *article of food* (*e*) with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state; and that no person shall knowingly sell such article so adulterated; under a penalty not exceeding 50*l.* for the first offence: and every offence after a previous conviction, shall be a misdemeanor punishable with imprisonment and hard labour to the extent of six months. Secondly, that no person shall (except for the purpose of compounding, as in the Act provided) mix, colour, stain or powder any *drug* with any ingredient or material so as to affect injuriously the quality or potency of such drug, with intent that the same may be sold in such state; and no person shall knowingly sell such adulterated drug; under the same penalty as in the preceding case. And, thirdly, that no person shall (with certain exceptions specified in the Act) sell, to the prejudice of the purchaser, any article of food or drug which is not of the nature, substance and quality of the article demanded by such purchaser (*f*), under a penalty not exceeding 20*l.* (*g*).

Other species of deceitful practices, contravening the law of honesty generally, have been incidentally noticed in

(*c*) 38 & 39 Vict. c. 55, ss. 116, 119.

(*d*) By this Act the previous enactments on this subject, chiefly contained in 23 & 24 Vict. c. 84, and 35 & 36 Vict. c. 74, are repealed; but the cases of Fitzpatrick *v.* Kelly, Law Rep., 8 Q. B. 337; Roberts *v.* Egerton, ib. 9 Q. B. 494; and Pope *v.* Tearle, ib. 9 C. B. 499, may still be noticed, as throwing light on the principles by which the construction of Acts of this character are governed.

(*e*) The term "food" in this Act shall include every article used for food or drink by man other than drugs or water. (38 & 39 Vict. c. 63, s. 2.)

(*f*) Analysts may be appointed under the Act, by whom articles sold may be tested. (Sect. 10.)

(*g*) As to the construction of this Act, see Barnes *v.* Chipp, Law Rep., 3 Ex. D. 176; Rooke *v.* Hopley, ib. 209; Webb *v.* Knight, ib. 2 Q. B. D. 530; Sandys *v.* Small, ib. 3 Q. B. D. 449.

former parts of this work. And our limits will not allow us to pursue the subject in the present place, further than to add the following instance of conduct of this nature which has been made the subject of a specific enactment. For if any person shall personate a master and give *a false character to a servant;* or assert in writing, contrary to truth, that any servant has been hired for a period of time or in a station, or was discharged at any time, or had not been hired in any previous service; or if any person shall offer himself or herself as a servant, pretending to have served where he or she has not served, or with a false certificate of character, or shall alter a certificate, or shall, contrary to truth, pretend not to have been in any previous service; the offenders, in any of the above cases, are liable, under 32 Geo. III. c. 56, on conviction before two justices of the peace, to be fined twenty pounds; and in default thereof to be imprisoned with hard labour, for any time not more than three months nor less than one calendar month.

XII. A *common nuisance* is also an offence against public convenience and the economical regimen of the State; and it consists in either doing a thing to the annoyance of all the lieges, or neglecting to do some good which the common welfare requires (*g*). Common nuisances are of the class of misdemeanors; and are distinguishable from *private* nuisances, as being a grievance to the community at large, and not merely to particular persons. Of the nature of common nuisances are—1. Annoyances in *highways* and *bridges*. Now offences affecting *highways* and *bridges* may be committed—as we have had occasion elsewhere to notice,—either positively, by actual obstructions, or negatively, by want of reparations. The negative kind can of course only be committed by those upon whom lies an obligation to repair. But positive offences in reference to highways and bridges, consist of a variety of nuisances and other injuries capable of being committed by any per-

(*g*) Hawk. P. C. b. 1, c. 75, s. 1.

son indiscriminately (*h*); and some of these are punishable at common law, and others under the express provisions of the highway, bridge and turnpike Acts (*i*). 2. Another species of nuisance is the carrying on of any *offensive* or *dangerous trade* or *manufacture* (*k*). Such carrying on, when only occasioning injury to some private individual, may form the subject of an action at his suit; but when it is detrimental to the public at large, it is a criminal offence punishable by fine and imprisonment; and it may be remarked, that to support an indictment for such nuisances as these, it is not necessary to prove that they are offensive to health, if they be manifestly offensive to the senses (*l*). 3. So also *exposing*, in a public thoroughfare, a *person infected with a contagious disease*, is a common nuisance, and punishable by fine and imprisonment (*m*). 4. All *disorderly inns or other houses* (*n*); *bawdy houses* (*o*); *gaming houses; play houses unlicensed* or *improperly con-*

(*h*) When there is a house improperly erected, or inclosure made, upon any part either of the royal demesnes, or of a highway or common street or public water or such like public places,—the proper and antient name for such a nuisance is a *purpresture;* from the French word *pourpris*, an inclosure. (See 4 Bl. Com. p. 167, citing Co. Litt. 277.)

(*i*) As to nuisances to highways, see 5 & 6 Will. 4, c. 50; 4 & 5 Vict. cc. 51, 59; 8 & 9 Vict. c. 71; 25 & 26 Vict. c. 61. As to nuisances to turnpike roads, see 3 Geo. 4, c. 126; 4 Geo. 4, c. 95; 4 & 5 Vict. cc. 33, 51. As to nuisances to bridges, see 55 Geo. 3, c. 143. As to a *felonious* destruction or damage to a bridge, turnpike gate, &c., vide sup. p. 145.

(*k*) See 1 & 2 Geo. 4, c. 41, as to the negligent use of a furnace or steam engine.

(*l*) Rex *v.* Neil, 2 C. & P. 485.

(*m*) See Rex *v.* Vantandillo, 4 M. & S. 73. Such exposure is also punishable in certain cases under the Police Acts, by way of summary conviction.

(*n*) We may remark here, that an inn,—being intended for the lodging and receipt of travellers,—may be indicted, suppressed, and the innkeeper fined, if a traveller be refused entertainment by him without a very sufficient cause: for thus to frustrate the end of its institution is held to be disorderly behaviour; and therefore punishable as an offence, besides exposing the landlord to be sued for damages. (See Hawk. P. C. b. 1, c. 78, s. 2; Bull. N. P. 73; Bennet *v.* Mellor, 5 T. R. 273; Fell *v.* Knight, 8 Mee. & W. 269.) As to the offence of suffering gaming or unlawful games to be carried on in a licensed house, see 35 & 36 Vict. c. 94, s. 17.

(*o*) See 25 Geo. 2, c. 36, s. 5 and 58 Geo. 3, c. 70.

ducted; unlicensed booths and stages for rope dancers and mountebanks (*m*); and the like,—are either at common law, or by statute, public nuisances; and may, upon indictment, be suppressed and fined (*n*); and their keepers, in some cases, imprisoned with hard labour (*o*). Against *gaming houses*, in particular, the efforts of the legislature have been directed with assiduous care. Thus the statute 33 Hen. VIII. c. 9, s. 11, prohibited the keeping any common house for dice, cards, or any "unlawful games" (*p*), under pecuniary penalties of 40*s.* for every day of so keeping the house, and 6*s.* 8*d.* for every time of playing therein. Also, by provisions contained in 9 Ann. c. 19, 2 Geo. II. c. 28, 13 Geo. II. c. 19, and 18 Geo. II. c. 34,—a variety of games including those of faro, basset, ace of hearts, hazard, passage, roly poly and roulette; together with all other games played with dice, with the exception of backgammon;—were expressly prohibited under heavy penalties (*q*). And now by 8 & 9 Vict. c. 109 (*r*), 16 & 17

(*m*) Bac. Ab. tit. Nuisances. But by 6 & 7 Vict. c. 68, s. 23, theatrical representations in booths, or shows at fairs or feasts, &c., are lawful, when allowed by the local authorities. See 42 & 43 Vict. c. 34, an Act prohibiting children under the age of fourteen, from taking part in any public exhibition or performance endangering his or her life or limbs.

(*n*) By 22 & 23 Vict. c. 17, and 30 & 31 Vict. c. 35, s. 1, before an indictment for keeping a gaming or other disorderly house can be presented to or found by the grand jury, security must, in some cases, be given for the due prosecution of the charge.

(*o*) See 3 Geo. 4, c. 114.

(*p*) By 8 & 9 Vict. c. 109, so much of the above act was repealed as prohibits *bowling*, *tennis*, or other games of mere skill. As to the game of *billiards*, it is a lawful amusement, and consequently is not within the statute of Hen. 8; but, when played in public, it is placed by the Act of 8 & 9 Vict. under certain restrictions—keepers of public tables being required to be licensed by the justices, and being forbidden to allow play between the hours of one and eight (a.m.) on any day, or at any hour on a Sunday, Christmas Day, Good Friday, or day of public fast or thanksgiving.

(*q*) See also 30 Geo. 2, c. 24, s. 14, prohibiting under a pecuniary penalty, any gaming in public houses by labourers or servants.

(*r*) As to the different games that have been decided to fall within the prohibition contained in one or other of the Acts referred to in the text, see Goodburn *v.* Morley, 2 Stra. 1159; Jeffreys *v.* Walter, 1 Wils. 220; Lynall *v.* Longbottom, 2 Wils. 36; Hodson *v.* Terhill, 2 Tyrw. 929;

Vict. c. 119, 17 & 18 Vict. c. 38, and 37 & 38 Vict. c. 15, further provisions have been made in reference to the offence now under consideration, and in particular for the punishment of those who keep or frequent *common gaming houses* (*s*); and for the suppression of such houses, when discovered to exist (*t*). By these statutes (*u*), it is, among other things, provided that the owner or keeper of any common gaming house, and every person having the care or management thereof,—and every banker, croupier, and other person in any manner conducting the business of any such house,—shall, on conviction by the oath of one witness, before two justices of the peace, be liable, in addition to the penalties of 33 Hen. VIII. c. 9, to pay such penalty (not being more than 500*l.*) as shall be adjudged by such justices: or, in their discretion, to be committed to the house of correction, with or without hard labour, for not more than twelve calendar months (*x*). It is also enacted, that any person who having been concerned in unlawful gaming, shall,—on being examined as a witness touching such unlawful gaming,—make true discovery thereof to the best of his knowledge, shall be entitled to receive a certificate of his having done so; and shall be thereupon freed from all criminal prosecutions, forfeitures, and disabilities for any thing he has himself done in respect of such unlawful gaming (*y*). But, on the other hand, it has been also enacted, that any person found in a suspected

Bentinck *v.* Connop, 5 Q. B. 693; Daintree *v.* Hutchinson, 10 Mee. & W. 85; Applegarth *v.* Colley, ib. 723; Foot *v.* Baker, 5 Man. & G. 338.

(*s*) By 16 & 17 Vict. c. 119, and 37 & 38 Vict. c. 15, specific provisions are made against *betting* houses, which are declared to be "common gaming houses," and liable, as such, to be suppressed, and their keepers or frequenters punished. (See Shaw *v.* Morley, Law Rep., 3 Exch. 137; Haigh *v.* Sheffield, ib. 10 Q. B. 103.)

(*t*) By 8 & 9 Vict. c. 109, ss. 2, 5, 8, provisions are made as to what shall be sufficient evidence of keeping a common gaming house or of gaming.

(*u*) See also on this subject 31 Eliz. c. 5; 25 Geo. 2, c. 36; 42 Geo. 3, c. 119; and 2 & 3 Vict. c. 47.

(*x*) See 8 & 9 Vict. c. 109, s. 4; and 17 & 18 Vict. c. 38, s. 4.

(*y*) 8 & 9 Vict. c. 109, s. 9.

gaming place (*z*), may be *required* to be examined and to give evidence touching any unlawful gaming therein, or touching any obstructions to the entry; and shall not be excused from being examined or from answering any question touching such matters, on the ground that his evidence will tend to criminate himself (*a*). One of the above statutes (viz. 8 & 9 Vict. c. 109) contains, moreover, provisions that a person who shall by any fraud, unlawful device, or ill practice,—in play, betting, or wagering, at any game,—win any sum of money or valuable thing, shall be deemed guilty of obtaining the same by a *false pretence*, and be punished accordingly (*b*); that all contracts, (whether by parol or in writing,) by way of gaming or wagering, shall be null and void (*c*); and that no action shall be brought to recover money or valuable thing alleged to be won on any wager, or which was *deposited* in the hands of any person to abide the event on which any wager shall have been made (*d*). There is, however, a proviso, that this last enactment shall not be deemed to apply to any subscription towards a plate or prize at any "lawful" game, sport, pastime or exercise (*e*). Finally, it has

(*z*) Heavy pecuniary penalties are laid by 8 & 9 Vict. c. 109, and 17 & 18 Vict. c. 38, on such as unlawfully obstruct the authorized entrance of the police into suspected houses; or who, being there found, shall give false names or addresses.

(*a*) 17 & 18 Vict. c. 38, s. 5.

(*b*) 8 & 9 Vict. c. 109, s. 17. As to false pretences, vide sup. p. 152.

(*c*) 8 & 9 Vict. c. 109, s. 18. The cases which have arisen on this provision are very numerous. We can only notice the following as being useful decisions: Applegarth *v.* Colley, 10 Mee. & W. 723; Gatty *v.* Field, 9 Q. B. 431; Rosewarne *v.* Billing, 15 C. B., N. S. 316; Bubb *v.* Yelverton, Law Rep., 9 Eq. Ca. 471; Beeston *v.* Beeston, ib. 1 Ex. D. 13; Higginson *v.* Simpson, ib. 2 C. P. D. 76. See also 9 Ann. c. 19; 5 & 6 Will. 4, c. 41; Hay *v.* Ayling, 20 L. J. (Q. B.) 171; ex parte Pyke, in re Lister, Law Rep., 8 Ch. D. 754, as to *notes, bills or mortgages given for money won at play*.

(*d*) As to the construction of this provision, see Varney *v.* Hickman, 5 C. B. 271; Diggle *v.* Higgs, Law Rep., 2 Ex. D. 422; Hampden *v.* Walsh, ib. 1 Q. B. D. 189.

(*e*) As to *horse racing* for a plate or prize, it may be observed that it does not itself fall under any prohibitory enactment. For though by 13 Geo. 2, c. 19, no stakes or matches at horse races under 50*l.* value could be run under penalty of 200*l.*, this enactment was repealed by 3 & 4 Vict. c. 5. But by 42 & 43 Vict.

also been now provided by 36 & 37 Vict. c. 38, s. 3, that every person playing or betting by way of wagering or gaming *in any street, road, highway*, or *other open and public place*, or in any open place to which the public have access (*f*); at or with any table or instrument of gaming, or any card, coin, token, or other article used as an instrument of wagering at any game or pretended game of chance, shall be deemed *a rogue and vagabond* within the meaning of the statute 5 Geo. IV. c. 83 (to which reference will be made hereafter), and be liable to be convicted and punished accordingly; or else, at the discretion of the justices trying the case, in lieu thereof, may be adjudged to pay a penalty not exceeding forty shillings for the first offence nor five pounds for any subsequent one (*g*). 5. By statute 10 Will. III. c. 23, all *lotteries* are declared to be public nuisances; and all grants, patents, or licences for the same, to be contrary to law (*h*), and by 12 Geo. II. c. 28, 13 Geo. II. c. 19, and 18 Geo. II. c. 34, all private lotteries by tickets, cards, or dice, are specifically prohibited. State lotteries, however, were (notwithstanding these statutes) from time to time authorized by successive Acts of parliament, the last of which was the 4 Geo. IV. c. 60, in the year 1823, since which date this method of raising money for the public service has been discontinued. 6. To this head of a public nuisance at common law, we may also refer the *making*, *keeping*, or *carrying* too large a quantity of *gunpowder* at one time, or in one place or vehicle (*i*);

c. 18, no horse race is now lawful *within a radius of ten miles from Charing Cross*, unless in a place licensed for horse racing under that Act; and a horse race, in contravention of the statute, is to be deemed a nuisance as at common law. And as to *bets* on horse racing, see Coombes *v.* Dibble, Law Rep., 1 Exch. 248. As to a *coursing match*, see Daintree *v.* Hutchinson, 10 Mee. & W. 85. As to a *foot race*, see Batty *v.* Marriott, 5 C. B. 817.

(*f*) See Hirst *v.* Molesbury, Law Rep., 6 Q. B. 130; Tollett *v.* Thomas, ib. 514.

(*g*) 36 & 37 Vict. c. 38, repeals the Vagrant Act, 1863 (31 & 32 Vict. c. 52). As to the Vagrant Act of 5 Geo. IV., vide post, p. 257.

(*h*) See however 9 & 10 Vict. c. 48, legalizing *Art Unions* for the disposal of works of art by way of prizes.

(*i*) As to public nuisances arising

and of *using any mill* or *engine* for making gunpowder, except in a place duly licensed;—and these and the like practices are also prohibited *by statute*, under heavy penalties and forfeitures (*k*). And the Acts also require the manufacture of all *fireworks*, and of other preparations or compositions of an explosive nature, to be carried on in licensed places; and moreover prohibit, under a penalty, the sale of fireworks by persons unlicensed, and the sale of gunpowder to any person apparently under the age of thirteen (*l*). The Acts also declare that if a squib or other firework be thrown or fired in any thoroughfare or public place, the offender shall be liable to a penalty of 5*l.* (*m*). 7. *Eaves-dropping*,—or the offence committed by such as loiter under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales,—is also instanced in the books as a common nuisance; and the offenders are said to be indictable at sessions, and liable to be fined and bound over to their good behaviour (*n*). 8. Lastly, we may enumerate among nuisances noticed in our law, (though in practice it has long ceased to be the subject of prosecution,) that of being a *common scold*. For which indictable offence the *communis rixatrix*, (for our law confines it to the feminine gender,) might be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or *cucking* stool, which in the Saxon language is said to

from the keeping or using of dangerous materials generally, see Williams *v.* East India Company, 3 East, 200, 201; R. *v.* Taylor, 2 Str. 1167; R. *v.* Matters, 1 B. & Ald. 362; R. *v.* Moore, 3 B. & Ad. 184.

(*k*) The stowage of *petroleum* and other explosive oils has been specifically regulated by statute. (See 34 & 35 Vict. c. 105, and 42 & 43 Vict. c. 47.) See also, as to the storage and carriage of explosive substances generally (inclusive of *gunpowder* and *nitro-glycerine*), 38 & 39 Vict. c. 17. See also the following cases:—Biggs *v.* Mitchell, 2 B. & Sm., 573; Beck *v.* Stringer, Law Rep., 6 Q. B. 497; Jones *v.* Cook, ib. 505; Webley *v.* Woolley, ib. 7 Q. B. 61; Elliott *v.* Majendie, ib. 429.

(*l*) 38 & 39 Vict. c. 17, s. 31.

(*m*) See 2 & 3 Vict. c. 47, s. 4, and The Queen *v.* Bennett, 28 L. J. (M. C.) 27, as to this offence within the *metropolitan* district.

(*n*) See 4 Bl. Com. p. 168.

signify the scolding stool; though frequently corrupted into *ducking* stool; because the residue of the judgment ran that, when so placed therein, she should be plunged in the water for her punishment (*o*).

Such is the general state of the law, with respect to common nuisances; but it is material to add here that, as to all those species of them which tend to affect the *public health*, they have been of late very specially provided against by the several Acts which have been passed in such profusion for improving the sanitary condition of the people, and of which we gave some account in a preceding volume while the laws relating to this subject were under discussion. By the provisions of these Acts, a great variety of nuisances are specified and prohibited, under the penalties of misdemeanor in some instances, and in others under pecuniary penalties recoverable before a court of summary jurisdiction, that is to say, before the justices of the peace (*p*).

XIII. [*Lewdness* is also an offence not merely against morality, but also against the public convenience and economy when of an open and notorious character, as by frequenting houses of ill-fame, which is an indictable offence; or by some grossly scandalous and public indecency; for which the punishment is fine and imprisonment (*q*). In the year 1650 not only incest and wilful adultery were made capital crimes, but also the repeated act of keeping a brothel, or committing fornication, were (upon a second conviction) made felony without benefit of clergy (*r*). But at the restoration, when men, from an abhorrence of what they deemed the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these

(*o*) 4 Bl. Com. p. 168. Hawk. P. C. b. 1, c. 75, s. 5; 3 Inst. 219.

(*p*) Vide sup. bk. IV. pt. III. ch. IX.

(*q*) See a number of cases collected in a note to Christian's edition of Blackstone (vol. 4, p. 64).

(*r*) See Scob. 121.

[offences were then abandoned to the feeble coercion of the spiritual court, according to the rules of the canon law: a law which has treated the offence of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the constrained celibacy of its first compilers (*r*).] To this head may, however, be also properly referred the indictable offence of a public and indecent exposure of the person: and of the public selling or exposure for public sale, or to public view, of any obscene book, print, picture or other indecent exhibition:—the punishment of which is fine or imprisonment, or both, with hard labour at the discretion of the court (*s*). Moreover, in aid of the suppression of such practices, it has been provided by 20 & 21 Vict. c. 83, that on complaint made, on oath, before two justices (*t*), that obscene books, papers, writings, prints, pictures, drawings, or other similar representations are, to the complainant's belief, kept in some place for the purpose of being sold, distributed, exhibited, lent on hire, or otherwise published, for *gain*;—with an allegation that one or more articles of the like character have been published at or in connection with such place, so as to satisfy the justices that such belief of the complainant is well founded,—such justices may, (on being satisfied that any articles so kept are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such,) issue a special warrant authorizing an entry of the place specified in the complaint in the day-time by the police, and by force if necessary; and they are also enabled to order the seizure and destruction, (if the owner does not show good cause to the contrary,) of the articles in ques-

(*r*) Proceedings in the ecclesiastical courts, under the canon law, for incontinency, are out of use.

(*s*) 14 & 15 Vict. c. 100, s. 29. See the case of The Queen *v.* Bradlaugh and Besant, Law Rep., 2 Q. B. D. 569.

(*t*) The same powers are given by 20 & 21 Vict. c. 83, s. 1, to any single metropolitan or stipendiary magistrate.

tion. An appeal, however, is given by this Act to any person aggrieved, to the next general or quarter sessions of the peace (*u*).

We may also remark that, by 24 & 25 Vict. c. 100, s. 49, whoever shall by false pretences or representation, or other fraudulent means, procure any female under the age of twenty-one to have illicit carnal connection with any man, is made guilty of a misdemeanour, punishable with imprisonment with or without hard labour to the extent of two years (*v*).

XIV. The offence of *Drunkenness*, also, may be referred to this head; and it is punished by statute 4 Jac. I. c. 5, and 21 Jac. I. c. 7, s. 3, with the forfeiture of five shillings, to be paid, within one week after conviction, to the churchwardens, for the use of the poor: and upon a second conviction, the offender shall be bound with two sureties in 10*l.* for his good behaviour. And if the drunkenness be accompanied with any riotous or indecent behaviour, committed in a street of any town within the police provisions of 10 & 11 Vict. c. 89, the offence, by the 29th section of that Act, is punishable by a penalty not exceeding forty shillings, or seven days' imprisonment (*x*). Moreover, by "The Licensing Act, 1872" (35 & 36 Vict. c. 94), sect. 12, every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, is made liable to a penalty not exceeding ten shillings (*y*); and on a second conviction within twelve months, twenty shillings; and on a third or subsequent conviction within such period, forty shillings; while, if the drunkenness be accompanied with riotous or disorderly behaviour, or while

(*u*) 20 & 21 Vict. c. 83, s. 4.

(*v*) It is pointed out in the Report of the Criminal Code Bill Commission (p. 22), in reference to this section, that it is "so widely "drawn as (in terms at least) to ap- "pear to make the seduction of a "woman under age a criminal of- "fence in almost every case." The Report suggests, however, that the legislature must have intended a seduction *from motives of lucre;* and adds that, in practice, the provision has been so treated.

(*x*) See Martin *v.* Pridgeon, 1 E. & E. 778.

(*y*) See Lester *v.* Torrens, Law Rep., 2 Q. B. D. 403.

the offender is in charge of a carriage, horse, cattle or steam engine, or while in the possession of loaded firearms, the same penalty as last mentioned may be imposed, or he may be alternatively sentenced to imprisonment for any term not exceeding one month, with or without hard labour (*z*).

XV. Another indictable offence, which may be ranked under the present chapter, is that of *wanton and furious driving;* as to which, it is declared by 24 & 25 Vict. c. 100, that if any person, having the charge of any carriage or vehicle, shall by wanton or furious driving, or racing, or other wilful misconduct or neglect do, or cause to be done, any bodily harm to any person whatever, he shall be guilty of a misdemeanor, and may be imprisoned with or without hard labour to the extent of two years (*a*). It may be remarked that the enactment, that such conduct shall amount to a misdemeanor, is declaratory only of the common law; according to which it is misdemeanor,—and may even amount to manslaughter or murder,—for any person to drive or ride so wantonly and furiously, as to endanger the passengers on the highway (*b*).

XVI. A seventh offence is that of *cruelty to animals;* it being, in the first place, enacted generally by 12 & 13 Vict. c. 92 (*c*), that if any person shall cruelly beat, ill-treat, overdrive, abuse, or torture any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig,

(*z*) As to the offence of drunkenness when committed by a person subject to military law, see 42 & 43 Vict. c. 33, s. 17. See also the Naval Discipline Act (29 & 30 Vict. c. 109, s. 27), as to persons subject to that statute.

(*a*) 24 & 25 Vict. c. 100, s. 35. The offender may also be bound over to keep the peace or be of good behaviour (sect. 71).

(*b*) Fost. 263; see R. *v.* Mastin, 6 C. & P. 396; R. *v.* Taylor, 9 C. & P. 672.

(*c*) This Act was amended by 17 & 18 Vict. c. 60, not in reference to the matters mentioned in the text, but with a view to improve the regulations as to providing animals *impounded* with a proper supply of food and water; and also as to prohibiting dogs from being used for the purposes of *draught*. (As to which, see also 2 & 3 Vict. c. 47.)

sow, goat, dog, cat, or any other "domestic animal" (*d*), he shall forfeit a sum not exceeding 5*l.* for every such offence, recoverable before a justice of the peace in a summary way: and if by any such misconduct he shall injure the animal, or any person or property, a further sum not exceeding 10*l.* to the owner or person injured (*e*). The Act also inflicts penalties in the case of conveying any such animal from one place to another in such a manner or position, as to subject it to unnecessary pain or suffering; and also in the case of bull-baiting, cock-fighting, and the like (*f*). And it makes a variety of humane provisions for the regulation of the business of slaughtering horses, and cattle not intended for butcher's meat (*g*).

In addition to the above provisions it has now been thought right to extend the protection of law on this subject to the case of animals which, for medical, physiological, or other scientific purposes, are subjected, when alive, to experiments calculated to inflict pain. It has accordingly been provided, by the 39 & 40 Vict. c. 77 (The Cruelty to Animals Act, 1876), that a person shall not, under a heavy penalty, perform on a living animal any experiment calculated to give pain, except subject to the restrictions imposed by the Act; that is to say (amongst others of greater detail, for which we must refer the reader to the statute itself), unless the operator hold a licence from the secretary of state (*h*), and unless the experiment itself is not performed

(*d*) The definition of the word "animal" in the interpretation clause of the Act (12 & 13 Vict. c. 92, s. 20) is that given in the text. See Murphy *v.* Manning, Law Rep., 2 Ex. D. 307, which was a case as to cruelly cutting the *combs of cocks*.

(*e*) Previous Acts on the same subject, 3 & 4 Geo. 4, c. 71, and 3 Will. 4, c. 19, were repealed by 5 & 6 Will. 4, c. 59; which was itself repealed by 12 & 13 Vict. c. 92.

(*f*) See Clarke, app. *v.* Hague, resp., 29 L. J. (M. C.) 105; Mosley, app., Greenhalgh, resp., 3 B. & Smith, 374; Clark, app. *v.* Hague, resp., 2 Ell. & Bl. 281.

(*g*) 12 & 13 Vict. c. 92, s. 9. See Colam *v.* Hall, Law Rep., 6 Q. B. 206.

(*h*) An application for a licence must be signed by one or more of the Presidents of the Royal Society, of the Royal Society of Edinburgh,

(unless after obtaining such special certificate as in the Act mentioned) as an illustration of lectures or for the purpose of attaining manual skill, but is performed with a view to the advancement, by new discovery, of physiological knowledge, or of knowledge which will be useful for saving or prolonging life or alleviating suffering. And it is, moreover, enacted that, even when so performed, the animal must (as the general rule) be under the influence of some anæsthetic of sufficient power to prevent it from feeling pain (*h*); and, lastly, there is a general provision making it in all cases illegal to admit the general public to witness such experiments.

XVII. *Taking up dead bodies* from the place where they have been interred, for the purpose of dissection or otherwise, is also a misdemeanor at common law, and punishable with fine and imprisonment (*i*). And under this head may also be noticed the offence, of *refusing to bury dead bodies* by those whose duty it is so to do; which appears to be punishable by the temporal courts, (independently of ecclesiastical censures,) on indictment or information (*j*).

XVIII. *Refusing to serve a public office* (such as that of constable or overseer), without lawful excuse or exemption,

of the Royal Irish Academy, of one of the Royal Colleges of Surgeons or Physicians, of the General Medical Council, of the Faculty of Physicians and Surgeons of Glasgow, or (in reference to veterinary experiments) of the Royal College of Veterinary Surgeons, or of the Royal Veterinary College, London; and, as the general rule, the application must also be signed by one of the several professors specified in the Act (39 & 40 Vict. c. 77, s. 11).

(*h*) The Act contains special directions with respect to operations performed on dogs, cats, horses, asses and mules (39 & 40 Vict. c. 77, s. 5).

(*i*) See Arch. Cr. Pr. 675; R. *v.* Lynn, 2 T. R. 733; 2 East's P. C. c. 16, s. 89; R. *v.* Duffin, R. & R. C. C. R. 365; The Queen *v.* Sharpe, 26 L. J. (M. C.) 47; 2 & 3 Will. 4, c. 75.

(*j*) Andrews *v.* Cawthorne, Willes, 527, n. a; and see Mastin *v.* Escott, decided May 8, 1841, by Sir H. Jenner Fust; and Kemp *v.* Wickes, 2 Phil. Rep. 264. As to the interment of dead bodies cast on shore from the sea, see 48 Geo. 3, c. 75.

is also a misdemeanor at common law, punishable with fine and imprisonment (*k*).

XIX. Lastly, under the general head of *vagrancy and other disorderly conduct*, may be classed a variety of offences against the public economy. The civil law expelled all sturdy vagrants from the city (*l*). And, in our own law, idle persons and vagabonds,—whom our antient statutes describe to be "such as wake on the night "and sleep on the day, and haunt customable taverns "and alehouses, and routs about; and no man wot from "whence they come, ne whither they go;" are more particularly described by statute 5 Geo. IV. c. 83, and are there divided into three classes, *idle* and *disorderly* persons, *rogues* and *vagabonds*, and *incorrigible rogues* (*m*). These are all offenders against the good order, and blemishes in the government, of any kingdom, and they may be proceeded against under the 4th section of the above statute; and, if convicted, may be punished as follows (*n*); that is

(*k*) Arch. Cr. P. 769. See R. *v.* Poynder, 1 B. & C. 178; R. *v.* Bower, ib. 587.

(*l*) 4 Bl. Com., p. 169, citing Nov. 80, c. 5.

(*m*) The statute particularly defines the persons who are to come within one or other of these three general appellations, but the enumeration is too long for insertion. By other Acts, also, persons committing particular offences of various kinds are to be deemed *idle and disorderly persons*, &c., within the statute of Geo. 4, and may be punished accordingly. See 1 & 2 Vict. c. 38; 29 & 30 Vict. c. 113, s. 15; 34 & 35 Vict. c. 112, s. 15; 36 & 37 Vict. c. 38.

(*n*) We may remark here, that two classes of offenders seem to be now punishable under the Act of Geo. 4, who were formerly treated by our law with much more severity. 1. *Idle soldiers and marines*, or persons pretending to be *soldiers or marines, wandering about the realm*. Such persons were deemed under the statute 39 Eliz. c. 17, (repealed by 52 Geo. 3, c. 31,) to be *ipso facto* guilty of a capital felony. 2. *Outlandish persons calling themselves Ægyptians or Gypsies:* Against these, provisions were made by 1 & 2 Ph. & M. c. 4, and 5 Eliz. c. 20; by which, if the gypsies themselves, or if any person, being fourteen years old, who had been seen or found in their fellowship, or had disguised himself like them, remained in this kingdom one month, it was felony; and we are informed by Sir M. Hale (1 Hale, P. C. 671), that at one Suffolk assizes no less

to say,—"idle and disorderly persons," with one month's imprisonment, and hard labour: "rogues and vagabonds," with three months' imprisonment, and hard labour: while "incorrigible rogues," may be committed to the next sessions of the peace, and kept to hard labour in the interim: and may be further punished, if convicted at the sessions, with imprisonment and hard labour for one year, and with whipping, except in the case of females (*o*).

than thirteen gypsies were executed upon these statutes. But they are now repealed by 23 Geo. 3, c. 51, and 1 Geo. 4, c. 116. (See also 19 & 20 Vict. c. 64.) Blackstone remarks (vol. iv. p. 165), as to gypsies, that "they are a strange "kind of commonwealth among "themselves of wandering im- "postors and jugglers, who were "first taken notice of in Germany "about the beginning of the fif- "teenth century, and have since "spread themselves all over Europe. "Munster, who is followed and re- "lied upon by Spelman and other "writers, fixes the time of their "first appearance to the year 1417; "under passports, real or pre- "tended, from the Emperor Sigis- "mund, king of Hungary. And "Pope Pius the second, (who died "A.D. 1464,) mentions them in his "history as thieves and vagabonds, "then wandering with their fami- "lies over Europe under the name "of Zigari; and whom he sup- "poses to have migrated from the "country of the Zigi, which nearly "answers to the modern Circassia. "In the compass of a few years "they gained such a number of "idle proselytes (who imitated "their language and complexion, "and betook themselves to the "same arts of chiromancy, begging "and pilfering), that they became "troublesome, and even formid- "able, to most of the states of "Europe. Hence they were ex- "pelled from France in the year "1560, and from Spain in 1591. "And the government in England "took the alarm much earlier; for "in 1530 they are described by "statute 22 Hen. 8, c. 10, as out- "landish people calling themselves "Egyptians, using no craft nor feat "of merchandize, who have come "into this realm and gone from "shire to shire, and place to place, "in great company, and used "great subtle, and crafty means to "deceive the people; bearing them "in hand, that they by palmestry "could tell men and women's for- "tunes; and so, many times, by "craft and subtilty have deceived "the people of their money, and "also have committed many heinous "felonies and robberies." Much more recent information, however, as to the origin and history of the gypsies will be found in the work of Mr. Borrow, called "Zincali," published in 1841.

(*o*) By 5 Geo. 4, c. 83, s. 13, houses of reception for travellers may be searched for vagrants, &c., and the suspected parties may be carried before a magistrate. (See also 34 & 35 Vict. c. 112, ss. 15, 16.)

CHAPTER VIII.

OF OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE AND THE MAINTENANCE OF PUBLIC ORDER.

WE are now arrived, according to the arrangement before laid down, at the consideration of offences affecting the administration of justice and the maintenance of public order (*a*). Of these, some are felonious, others only misdemeanors.

I. The first which we shall mention, is the stealing, injuring, forging or falsifying any public *record*, whether it be of what has taken place in a court of justice or otherwise; all of which practices, are high offences. For no man's property would be safe if records might be suppressed or falsified, or person's names be falsely usurped in courts (*b*). With regard to the *stealing* or *injuring* the records of the courts, this is specifically provided against by 24 & 25 Vict. c. 96, s. 30; and it is thereby made a felony, punishable by penal servitude to the extent of five years (*c*), or imprisonment for not more than two years, with or without hard labour and solitary confinement, to steal or fraudulently take from its proper deposit or custody, —or maliciously to cancel, obliterate, injure or destroy,— any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatever, belonging to any court of record or equity, or relating to any matter in such court (*d*).

(*a*) Vide sup. p. 162.

(*b*) 4 Bl. Com. p. 128.

(*c*) See 27 & 28 Vict. c. 47.

(*d*) If the court trying such offence shall think fit, it may also bind over the offender to keep the peace. (24 & 25 Vict. c. 96, s. 30.)

And so, too, the *forgery* or *falsification* of records is provided against by 24 & 25 Vict. c. 98, ss. 27, 28, which enact that it shall be a felony punishable by imprisonment as above mentioned, or penal servitude to the extent of seven years, to forge, or fraudulently alter or utter, any such court record or document as above specified. And that the above penalties shall also attach to any person who, as clerk of any court or otherwise, shall knowingly utter any false copy or certificate of any record, or forge the seal or process, of any court of record (*e*). There are also enactments on this subject (in reference to public records generally) contained in an earlier statute, viz., the 1 & 2 Vict. c. 94 (*f*), intituled "An Act for keeping safely the Public Records." And by these it is enacted, that any person employed in the Public Record Office who shall certify any writing as a true copy of a record in the custody of the Master of the Rolls, knowing the same to be false in any material part,—shall be guilty of felony: and he is punishable with penal servitude for life, or not less than five years; or imprisonment for not more than four nor less than two years (*g*). Moreover, by 14 & 15 Vict. c. 99 (the "Evidence Amendment Act, 1851"), if any officer authorized or required by that Act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing that the same is not so, he shall be guilty of a misdemeanor; and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months (*h*).

II. [Any *striking*, or *other outrage, in the superior courts of justice*, in Westminster Hall, or at the assizes, is highly

(*e*) In this case, also, the offender, after conviction, may be bound over to keep the peace. (24 & 25 Vict. c. 98, s. 51.)

(*f*) The Public Record Office Act, 1838, has been amended in certain matters by the 40 & 41 Vict. c. 55, but not in respect of the provisions referred to in the text.

(*g*) 1 & 2 Vict. c. 94, s. 19; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

(*h*) 14 & 15 Vict. c. 99, s. 15.

[penal. Indeed by the antient common law before the Conquest, striking in the king's courts of justice, or drawing a sword therein, was a capital felony (*i*); and even afterwards the law retained so much of the antient severity, as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in the superior courts, or courts of assize or *oyer* and *terminer*, whether blood be drawn or not; or assaulting a judge sitting in the court, by drawing a weapon, even without any blow struck;—is punishable with the loss of the right hand (*k*), imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life (*l*). Moreover, not such only as commit actual violence of this description, but such as use threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision; and have been punished with large fines, imprisonment, and other corporal punishment (*m*).]

(*i*) Wilk. Leg. Anglo-Sax., LL. Inæ, c. 6; LL. Canut. c. 56; LL. Alured. c. 7.

(*k*) In reference to this singular relic of our antient system of criminal law, which has not (at least in terms) been touched upon by modern enactments, it may be mentioned that the matter came under the serious consideration of the courts in our own times. For in the year 1799, Lord Thanet and others having been prosecuted for a riot, at the trial of Arthur O'Connor and others for treason under a special commission, two of the defendants were found guilty, generally. Now the three first counts charged (*inter alia*), that the defendants did riotously make an assault on one J. R., and did then and there *beat*, *bruise*, *wound* and ill-treat the said J. R., in the presence of the commissioners. And when the defendants were brought up for judgment, Lord Kenyon expressed doubts, whether the court was not bound to pronounce the judgment of amputation of the right hand, &c. as required in a prosecution expressly for striking in a court of justice. In consequence of these doubts, the attorney-general entered a *nolle prosequi* upon the three first counts; and the court pronounced judgment of fine and imprisonment on the others, as for a common riot.—(27 St. Tr. 821.)

(*l*) Staundf. P. C. 38; 3 Inst. 140, 141; Hawk. b. 1, c. 21, s. 3. So it is laid down that a *rescue* of a prisoner from any of the said courts, is punishable with perpetual imprisonment and forfeiture of goods, and of the profits of lands during life; but if no actual blow be given, amputation of the hand is excused. (4 Bl. Com. p. 125.) See as to *rescue* in other cases, post, p. 266.

(*m*) Harrison's case, Cro. Car.

III. [Another species of offence, somewhat allied to the last,—is that of *intimidation, or other improper demeanor, practised towards the parties or witnesses in a court of justice.* As if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody and properly executing his duty (*n*); or if a man endeavours to dissuade a witness from giving evidence, or advises a prisoner to stand mute; these are all impediments to justice, are high misprisions and contempts of the king's courts, and are punishable with fine and imprisonment. Antiently, indeed, it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made an accessory to the offence, if felony, and in treason, became a principal; and at this day it is agreed that he is guilty of a high misprision, and liable to be fined and imprisoned (*o*).

So as regards jurors, an offence somewhat of the same character as the last may be committed, which is described in the books as *embracery;* that is, attempting to influence them corruptly to one side, by promises, persuasions, entreaties, money, entertainments and the like.] The punishment for this misdemeanor in the person embracing and the juror embraced is, by the common law,—and also under the provision contained in 6 Geo. IV. c. 50, s. 61,—fine and imprisonment (*p*).

503. The court itself, also, against which the contempt is committed, has power to punish it in a summary way by fine or imprisonment.

(*n*) 3 Inst. 141, 142. Blackstone remarks (vol. iv. p. 126), that these offences, when they proceeded further than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods; and he cites Stiernh. de Jure Goth. l. 3, c. 2.

(*o*) See Barr. on Statutes, 212; 27 Ass. Pl. 44, s. 4, fol. 138; Hawk. P. C. b. 1, c. 21, s. 15.

(*p*) The false verdict of jurors, whether occasioned by embracery or not, was antiently considered as criminal; and therefore severely punished by means of the writ of *attaint.* (See 3 Bl. Com. pp. 388, 402; 6 Geo. 4, c. 50, s. 60.)

IV. A fourth offence which may be here noticed, is that of *obstructing a lawful arrest, or, generally, the execution of lawful process.* [This is, in all cases, an offence of a very high and presumptuous nature: but more particularly so, when it is an obstruction of an arrest upon criminal process: and it hath been holden that the party opposing such arrest, becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in treason (*q*). Formerly one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, (especially in London and Southwark,) where indigent persons assembled together to shelter themselves from justice,—under the pretext of their having been antient palaces of the Crown, or the like (*r*).] But all of these sanctuaries for iniquity are now demolished, and the opposing of any process therein was made highly penal by the statutes 8 & 9 Will. III. c. 27; 9 Geo. I. c. 28; 11 Geo. I. c. 22; and 1 Geo. IV. c. 116: which enacted, that persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavour to execute his duty therein, so that he receives bodily hurt; and all persons aiding and abetting such opposition; shall be guilty of felony. The principal provisions, however, as regards the offence now under consideration, are contained in more recent enactments; and, particularly, in the 24 & 25 Vict. c. 100, ss. 18 and 38. Of the first of these we had occasion to speak in a former place, as amounting in certain cases to a crime of the same malignity as an attempt to murder (*s*). By the section last named it is enacted that whoever shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in his aid, or

(*q*) Hawk. P. C. b. 2, c. 17, s. 1.

(*r*) Such as *White Friars* and its environs; the *Savoy;* and the *Mint*, in Southwark. Some further information on the subject of the law of sanctuary will be found in a later part of this work.

(*s*) Vide sup. p. 80.

shall assault any person with intent to resist or prevent his own lawful apprehension or detainer, or that of any one else, for any offence,—shall be guilty of a misdemeanor, punishable to the extent of two years, with or without hard labour (*t*).

V. [*Escape and Prison-breach.* To suffer the *escape* of a person, lawfully arrested for crime, so that he shall gain his liberty before he is delivered by course of law, is also an offence against public justice (*u*). And the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner himself,—the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. Officers, therefore, who after arrest *negligently* permit a felon to escape, are punishable by fine (*v*); but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence: for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody; whether treason, felony or trespass. And this, whether he were actually committed to gaol, or only under a bare arrest (*x*). But the officer cannot be thus punished as for felony, till the original delinquent hath actually received judgment or been outlawed (*y*) in respect of the crime for which he was so committed or arrested; otherwise it might happen that the officer might be punished for felony, and the person arrested and escaping might turn

(*t*) See also 34 & 35 Vict. c. 112, s. 12, as to *any* assaults upon constables while in the execution of their duty.

(*u*) Hawk. P. C. b. 2, c. 17, s. 3; c. 19, ss. 2, 3.

(*v*) 1 Hale, P. C. p. 600.

(*x*) Ib. p. 590; Hawk. P. C. b. 2, c. 19, s. 22.

(*y*) Process of outlawry in *criminal* cases, where the person charged cannot be apprehended, is not as yet abolished, though it may be said to be obsolete. (See Report of Criminal Code Bill Commission, p. 36.)

[out to be an innocent man (*z*).] But even before the conviction of the principal party, the officer (or even any private person) who having another in his lawful custody as for crime committed, violates his duty by permitting an escape from prison, or before he has (in the latter case) delivered him over to the proper authority,—may be fined and imprisoned for a misdemeanor, and may be kept to hard labour besides (*a*).

As for the prisoner himself, *breach of prison* (or even conspiring to break it), was felony at common law for whatever cause he was committed (*b*). But this severity was mitigated by the statute *De frangentibus prisonam*, (23 Edw. I.,) which enacted, that the offence should be deemed felonious only when judgment for felony would have ensued in case of his conviction (*c*). So that to break prison when committed for any treason or other felony, is still felony as at the common law (*d*); and the offence is now made punishable with penal servitude for not more than seven nor less than five years; or by imprisonment, (with or without hard labour, solitary confinement and whipping,) not exceeding two years (*e*). And to break prison, when lawfully confined upon any other inferior charge, is punishable as a high misdemeanor by fine and imprisonment (*f*). And in connection with this offence it may be noticed that for a convict to be at large (without lawful cause) before the expiration of the term for which he has been sentenced to be kept in penal

(*z*) It is said, however, he is punishable in the case of *treason*, where the party escaping has been actually guilty of treason, whether he has been attainted of it or not. (Hawk. P. C. b. 2, c. 19, s. 26.)

(*a*) See Hawk. P. C. b. 2, c. 20, s. 6. and 14 & 15 Vict. c. 100, s. 29.

(*b*) Bract. l. 3, tr. 2, c. 9; 1 Hale, P. C. 607. See R. v. Haswell, R. & R. C. C. R. 458.

(*c*) 1 Hale, P. C. 609.

(*d*) It seems, however, that if the prisoner though he break prison fail to actually escape, it is no felony. (Hawk. P. C. b. 2, c. 18, s. 11.)

(*e*) 7 & 8 Geo. 4, c. 28, ss. 8, 9; 7 Will. 4 & 1 Vict. c. 90, s. 5; 14 & 15 Vict. c. 100, s. 29; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

(*f*) Hawk. ubi sup. s. 20.

servitude, is an offence punishable by penal servitude for life; or else by imprisonment, with or without hard labour, not exceeding two years (*g*).

VI. *Rescue* and *aiding prisoners to escape*. *Rescue* is the forcibly and knowingly freeing another from any lawful arrest or imprisonment; and a rescue or an aiding a prisoner charged with felony to escape, is felony in the rescuer; if he be charged with treason, then treason; and if with a misdemeanor, a misdemeanor (*h*). But it is said that here also (as in the case of an escape permitted by the gaoler), the principal felon must first receive judgment before the rescuer can be punished as for felony: though even before, the rescuer may be prosecuted, at the discretion of the Crown, as for a misprision (*i*). These offences have now, however, been specially provided against by several statutes. For by 25 Geo. II. c. 37, s. 9, if any person shall rescue, or attempt to rescue, out of prison a person committed for, or found guilty of, murder; or a person convicted of murder, while going to, or during, execution (*j*), —he shall be deemed guilty of felony, and he may be sentenced to penal servitude for life, or not less than five years; or to imprisonment, with or without hard labour and solitary confinement, for not more than two years (*k*).

(*g*) See 5 Geo. 4, c. 84, s. 22; 4 & 5 Will. 4, c. 67, 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See also as to prison breach and escapes from *Millbank*, 6 & 7 Vict. c. 26, s. 22; from *Parkhurst*, 1 & 2 Vict. c. 82; ss. 12, 13; from *Pentonville*, 5 & 6 Vict. c. 29, s. 24. As to offenders in the colonies escaping to the united kingdom, and *vice versâ*, see 6 & 7 Vict. c. 34.

(*h*) Hawk. P. C. b. 2, c. 21. It is indeed, a misdemeanor in the rescuer, though the person rescued be not confined on any *criminal* charge. (R. *v.* Allan, 1 Car. & M. 295.)

(*i*) 1 Hale, P. C. 598, 607; Fost. 344; Hawk. ubi sup. s. 8.

(*j*) By the same statute it is also a felonious act to rescue or attempt to rescue the body of a murderer *after* execution.

(*k*) 25 Geo. 2, c. 37, s. 9; 7 Will. 4 & 1 Vict. c. 91; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

By 52 Geo. III. c. 156, every person assisting a prisoner of *war* to escape shall be guilty of felony; and he may be sentenced to the same punishments as just mentioned (*l*). By 1 & 2 Geo. IV. c. 88, s. 1, the rescuer of any person charged with felony, is declared guilty of felony; and he may be sentenced to penal servitude for not more than seven nor less than five years; or to imprisonment, with or without hard labour, for not less than one nor more than three years (*m*). By 5 Geo. IV. c. 84, whoever shall rescue, or attempt to rescue, any offender under sentence or order of penal servitude (*n*) from the custody of any person charged with his removal, shall be guilty of felony: and he may be sentenced to penal servitude for life, or to imprisonment, with or without hard labour, not exceeding two years (*o*). And, finally, by 28 & 29 Vict. c. 126, (The Prisons Act, 1865,) s. 37, every person who aids any prisoner in escaping or attempting to escape from any prison, or with intent to facilitate his escape conveys anything into the prison, shall be guilty of felony, and be imprisoned with hard labour to the extent of two years (*p*).

VII. [Another offence of the class under consideration is that of *taking a reward under pretence of helping the owner to his stolen goods.* This was a contrivance carried to a great length of villany in the reign of George the first, the confederates of the felons thus disposing of stolen

(*l*) 52 Geo. 3, c. 156; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47. As to this offence, see R. *v.* Martin, R. & R. C. C. R. 196.

(*m*) 1 & 2 Geo. 4, c. 88, s. 1; 14 & 15 Vict. c. 100, s. 29; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47. See also 16 Geo. 2, c. 31, and 1 & 2 Will. 4, c. 44, s. 5.

(*n*) The expression used in 5 Geo. 4, c. 84, is "transportation or banishment;" but see 20 & 21 Vict. c. 3, s. 6.

(*o*) 5 Geo. 4, c. 84, s. 22; 4 & 5 Will. 4, c. 67; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*p*) As to this provision see The Queen *v.* Payne, Law Rep., 1 C. C. 27.

[goods, at a cheap rate, to the owners themselves, and thereby stifling all further inquiry. The famous Jonathan Wild had under him a well-disciplined corps of thieves, who brought in all their spoils to him; and he kept a sort of public office, for restoring them to the owners at half price. To prevent which audacious practice,—to the ruin, and in defiance, of public justice,—it was enacted by 4 Geo. I. c. 11, that whoever should take a reward under the pretence of helping anyone to stolen goods, should suffer as the felon who stole them; unless, indeed, he caused such principal felon to be apprehended and brought to trial, and also gave evidence against him. And Wild, still continuing in his old practice, was, upon this statute, at last convicted and executed.] These provisions were afterwards repealed by 7 & 8 Geo. IV. c. 27, s. 1; but they were at the same time re-cast with improvements calculated for the more effectual prevention of the offence (*q*). And by the enactment on this subject now in force (viz. by 24 & 25 Vict. c. 96, s. 101) it is provided, that whoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatever, which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled or converted, or disposed of, as in that Act mentioned,—shall (unless he shall have used all due diligence to cause the offender to be brought to trial for the same) be deemed guilty of felony. And the punishment is penal servitude for seven or for not less than five years (*r*); or imprisonment, with or without hard labour and solitary confinement, for any term not exceeding two years; and, if a male under the age of eighteen years, to be whipped, if the court shall so think fit, in addition to such imprisonment (*s*).

(*q*) See 7 & 8 Geo. 4, c. 29, s. 58.

(*r*) See 27 & 28 Vict. c. 47.

(*s*) The court may also, if it see

VIII. *Compounding of felony*, is the taking of a reward for forbearing to prosecute a felony; and one species of this offence, (known in the books by the more antient appellation of *theft-bote*,) is where a party robbed takes his goods again, or other amends, entering into an agreement not to prosecute. [This was formerly held to make a man an accessory to the theft, but is now punished only with fine and imprisonment (*t*). This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law, "*latroni eum similem habuit, qui furtum celare vellet, et occulte sine judice compositionem ejus admittere*" (*u*).] The law on this subject is now regulated by 24 & 25 Vict. c. 96, s. 102 (amended by 33 & 34 Vict. c. 65), under which even publicly to advertise a reward for the return of property stolen or lost, and in such advertisement to use words purporting that no questions will be asked; or purporting that a reward will be paid without seizing or making inquiry after the person producing the same; or promising to return to a pawnbroker or other person any money he may have advanced upon or paid for such property, or offering any other sum of money or reward for the return of the same;—subjects the advertiser, the printer, and the publisher, to a forfeiture of fifty pounds each (*x*).

IX. Besides the last described offence, the mere concealment of a felony is by our law criminal; and is described, in the books, as *misprision of felony*. This is the concealment of some felony,—not being treason, the

fit, bind over the offender to keep the peace. (24 & 25 Vict. c. 96, s. 117.)

(*t*) Hawk. P. C. b. 1, c. 59, s. 6.

(*u*) Stiern. de Jure Goth. l. 3, c. 5.

(*x*) This provision re-enacts 7 & 8 Geo. 4, c. 29, s. 59. By the 33 & 34 Vict. c. 65, no action is to be brought under it against the printer or publisher of the advertisement *more than six months* after the forfeiture was incurred, nor (in any case) unless the written assent of the attorney or solicitor-general has been first obtained.

misprision of which has been already considered (*z*),—committed by another person; but without such previous concert with, or subsequent assistance of him, as will make the concealer an accessory before or after the fact. [And the punishment of misprision in a public officer, (by the statute Westminster the first, 3 Edw. I. c. 9,) is imprisonment for a year and a day; in a common person, imprisonment for a less, but discretionary time; and, in both, fine and ransom at the king's pleasure; an expression which signifies here (as in other cases where it occurs), not any extrajudicial will of the sovereign: but such as is declared by his representatives, the judges in his courts of justice—"*voluntas regis in curiâ, non in camerâ*" (*a*).

X. *Compounding of informations upon penal statutes, or of misdemeanors*, is also illegal.

As to the first of these, the compounding of *informations upon penal statutes*, it is an offence affecting the administration of justice by contributing to make the laws odious to the public. At once, therefore, to discourage malicious informers, and to provide that offences, when discovered, shall be duly prosecuted,—it was enacted by 18 Eliz. c. 5, that if any person informing, under pretence of any penal law, make any composition without leave of the court; or takes any money or promise from the defendant to excuse him; which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not the public good; he shall forfeit 10*l.*:] and he is also liable to suffer such imprisonment or additional fine, or both, as the court shall award, and shall be thenceforth disabled to sue on any popular or penal statute (*b*).

(*z*) Vide sup. p. 177.

(*a*) 1 Hale, P. C. 375.

(*b*) The punishment given by 18 Eliz. is altered as in the text by the effect of 56 Geo. 3, c. 138. As to this offence, see R. *v.* Best, 9 Car. & P. 368; R. *v.* Crisp, 1 B. & A. 282.

As to compounding *misdemeanors:* such a proceeding without leave of the court seems to be also illegal (*c*). [But it is not uncommon when a person has been convicted of a misdemeanor more immediately affecting an individual,—as a battery, imprisonment or the like,—for the court to permit the defendant to *speak with the prosecutor*, before any judgment is pronounced: and if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action (*d*).

XI. *Common barratry* is the offence of *frequently* inciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise (*e*). The punishment for this offence in a common person, is by fine and imprisonment; but if the offender, (as is too frequently the case,) belongs to the profession of the law, a barrator, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. And, indeed, it was enacted by 12 Geo. I. c. 29, that if any one who hath been convicted of forgery, perjury, subornation of perjury, or *common barratry*, shall practise as solicitor or agent in any action, the court, upon complaint, shall examine it in a summary way,] and, if such conduct be proved, the offender (by the effect of more

(*c*) See Collins *v.* Blantern, 2 Wils. 341; Edgcombe *v.* Rodd, 5 East, 297; Keir *v.* Leeman, 9 Q. B. 371; 4 Bl. Com. 136, note by Christian.

(*d*) Blackstone (vol. iv. p. 364) expresses a disapprobation of this practice, as contrary to the true policy of criminal jurisprudence. Even a voluntary forgiveness by the party injured "ought not," he says, "in true policy to intercept "the stroke of justice."

(*e*) Barratry is said to be a forensic term borrowed from the Normans: the Anglo-Norman *baret* signifying a quarrel or contention. See the notes to Bac. Abr. tit. Barratry (A). A single act of inciting, &c., is not sufficient. See R. *v.* Hardwicke, 1 Sid. 282; R. *v.* Hannon, 6 Mod. 311; Hawk. P. C. b. 1, c. 81, s. 5.

recent enactments) may even be sentenced to penal servitude for not more than seven nor less than five years (*f*).

[Hereunto may also be referred another offence of equal malignity and audaciousness, that of suing another in the name of a *fictitious plaintiff*,—either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it was directed by 8 Eliz. c. 2, s. 4, to be punished by six months' imprisonment, and damages to the party injured.

XII. *Maintenance* is an offence that bears a near relation to the former; being an officious intermeddling in an action that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it (*g*): a practice that was greatly encouraged by the first introduction of uses (*h*). This is an offence against the due administration of justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression (*i*). And therefore by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or to do any

(*f*) See 21 Geo. 2, c. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47. In the Solicitors' Act, 6 & 7 Vict. c. 73, the statute 12 Geo. 1, c. 29, was recognized as existing, and left unrepealed.

(*g*) Hawk. P. C. b. 1, c. 83, s. 23.

(*h*) Dr. and Stud. 203. As to uses, vide sup. vol. I. p. 355.

(*i*) Co. Litt. 368 (b); 2 Inst. 208, 212, 213; Hawk. ubi sup. Maintenance may consist (according to Bacon) not only in such officious intermeddling as is described by Blackstone (vol. iv. p. 135), which is termed *curialis;* but also in assisting another to his pretensions to lands, or holding them for him by force or subtilty, or stirring up quarrels in the county, in relation to matters wherein one is no way concerned. And this last species is known by the name of *ruralis*. (See Bac. Abridg. in tit. Maintenance.)

[act to support another's lawsuit by money, witnesses or patronage (*k*).] A man may, however, with impunity and indeed with propriety, out of charity and compassion, maintain the suit of his near kinsman (*l*), servant (*m*), or poor neighbour (*n*); and he may also maintain any action or other legal proceeding in which he has any interest, actual or contingent (*o*). But in cases where the offence is committed, its [punishment by common law, and also by statute 1 Rich. II. c. 4, is fine and imprisonment (*p*); and by statute 32 Hen. VIII. c. 9, a forfeiture of ten pounds.

XIII. *Champerty* (*campi partitio*) is a species of maintenance, and punished in the same manner (*q*)—being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for, if he shall prevail at law; whereupon the champertor is to carry on or defend the action at his own expense (*r*). Thus *champart*, in the French law, signifies a similar division of profits; being a part of the crop annually due to the landlord by bargain or custom. These pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted upon by the Roman law, "*qui improbè coëunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Juliâ de vi privatâ tenentur*" (*s*). And they were punished by the

(*k*) Ff. 48, 10, 28.

(*l*) Bac. Abridg. in tit. Maintenance; Hawk. P. C. b. 1, c. 83, s. 26.

(*m*) Hawk. ubi sup. ss. 31, 32, 33.

(*n*) Bro. Abr. tit. Maintenance, (14).

(*o*) Hawk. ubi sup. ss. 14, 15; and see Master *v.* Miller, 4 T. R. 340; Williamson *v.* Henley, 6 Bing. 299. As to what amounts to the offence of maintenance by a solicitor, see Earle *v.* Hopwood, 9 C. B., N. S. 566.

(*p*) Hawk. ubi sup. s. 38; 2 Inst. 208.

(*q*) Hawk. P. C. b. 1, c. 84, s. 1.

(*r*) Statute of Conspiracy, 33 Edw. 1, st. 3.

(*s*) Ff. 48, 7, 10.

[forfeiture of a third part of their goods, and by perpetual infamy (*t*). Hitherto must also be referred the provisions of the statute 32 Hen. VIII. c. 9, that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder,—on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor (*u*).]

XIV. The offence of *conspiracy* may be correctly described as a combination or agreement between two or more persons to carry into effect a purpose hurtful to some individual, or to particular classes of the community, or to the public at large (*x*); though this is subject to an exception in the case where the purpose is a felonious one, and actually accomplished;—the offence of conspiracy, (which is a misdemeanor only,) being then merged in the felony. Thus there may be conspiracy to commit murder or other crime; to seduce a female (*y*); to injure the

(*t*) There are on the subject of champerty the following statutes of antient date:—3 Edw. 1, c. 25; 33 Edw. 1, st. 3; 4 Edw. 3, c. 11. See also the following cases as to what amounts to maintenance and champerty: Stevens *v.* Bagwell, 15 Ves. jun. 139; Williams *v.* Protheroe, 5 Bing. 309; Stanley *v.* Jones, 7 Bing. 369; Bell *v.* Smith, 5 B. & C. 188; Earle *v.* Hopwood, 9 C. B., N. S. 566; Grell *v.* Levy, 16 C. B., N. S. 73; Sprye *v.* Porter, 7 E. & B. 58; Hutley *v.* Hutley, Law Rep., 8 Q. B. 112.

(*u*) As to this statute, see Cholmondeley *v.* Clinton, 4 Bligh, N. S. 4.

(*x*) See Mulcahy *v.* The Queen, Law Rep., 3 H. L. 306. Conspiracy has been frequently said to consist either of an agreement for an unlawful purpose, or to effect a lawful purpose by unlawful means. (R. *v.* Seward, 1 A. & R. 713; R. *v.* Jones, 4 B. & Ad. 349.) But the correctness of the antithesis has been questioned on high authority (R. *v.* Peck, 9 A. & E. 686); and it is clear that the terms *lawful* and *unlawful*, as here used, themselves require a definition. In many cases, too, it is difficult to distinguish precisely between the *purpose* and the *means*, in cases of conspiracy. As to the nature of this offence, see also Reg. *v.* Carlisle, 1 Dearsley's C. C. R. 337; R. *v.* Warburton, Law Rep., 1 C. C. R. 274.

(*y*) See R. *v.* Grey, 3 St. Tr. 519; R. *v.* Delaval, 3 Burr. 1434.

public health by selling unwholesome provisions (*z*); to raise the funds by the propagation of false intelligence (*a*), to defraud some person or persons of his or their property (*b*); and the like (*c*). But one of the chief species of this offence, (and that which brings it within the subject matter of the present chapter,) is that of *falsely and maliciously conspiring to indict an innocent man* (*d*). [This is an abuse and perversion of justice; for which the party injured may either have a civil action, or else the conspirators may be indicted at the suit of the Crown (*e*); and (being convicted) they were by the antient common law to receive what was called the villenous judgment (*f*): viz., to lose their *liberam legem*, whereby they were discredited and disabled as jurors and witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their bodies committed to prison (*g*). But it is now the better opinion that the villenous judgment is by long disuse become obsolete, it not having been pronounced for some ages (*h*); but instead thereof, such conspirators are usually sentenced to fine and imprisonment (*i*);] to which, by

(*z*) See R. *v.* Mackarty and Fordenbourgh, 2 Ld. Raym. 1779; 2 East, P. C. c. 18, s. 5; 6 East, 133.

(*a*) See R. *v.* De Beranger, 3 M. & S. 67.

(*b*) See Queen *v.* Gompertz and others, 9 Q. B. 824.

(*c*) Hawk. P. C. b. 1, c. 72, s. 2.

(*d*) Hawk. ubi sup. et s. 9; 3 Inst. 143; see R. *v.* Spragg, 2 Burr. 998; R. *v.* Macdaniel, 1 Leach, C. C. 45. As to the *felonious* offence of accusing or threatening to accuse another of crime, with intent to extort property, vide sup. p. 133.

(*e*) In some cases, before an indictment for a conspiracy can be presented to or found by a grand jury, security must be given for the due prosecution of the charge. (22 & 23 Vict. c. 17; 30 & 31 Vict. c. 35, s. 1.)

(*f*) Bro. Abr. tit. Conspiracy, 28.

(*g*) Hawk. P. C. b. 1, c. 72, s. 9.

(*h*) It is to be observed, in reference to this subject, that until a recent period persons who were *infamous*, (that is, of such a character that they might be challenged as jurors *propter delictum*), were, independently of any villenous judgment, inadmissible as witnesses. But they are now made competent by 6 & 7 Vict. c. 85.

(*i*) Blackstone adds "pillory," but this punishment is now abolished. Vide post, p. 281, n. (*k*).

14 & 15 Vict. c. 100, s. 29, may now be added, (in most cases of conspiracy,) hard labour, during the whole or any part of the term of imprisonment. We may add that, with regard to a conspiracy, the object of which is to commit the particular crime of *murder*, there is a provision contained in 24 & 25 Vict. c. 100, whereby all persons who shall conspire, confederate and agree to murder any person, (whether a subject of her majesty or not, and whether within her dominions or not,) and whoever shall solicit, encourage, persuade or endeavour to persuade, or shall propose to any person, to murder any other person, —are severally guilty of a misdemeanor, and punishable either by imprisonment (with or without hard labour) to the extent of two years; or, at the discretion of the court, by penal servitude to the extent of ten years or not less than five years (*k*).

With respect to this offence of conspiracy in general (and not merely when it affects the administration of justice), it may be further remarked, that it is deemed to consist rather in the guilty combination or agreement, than in the act by which it is carried into effect: and therefore, in an indictment for conspiring to do a thing in itself unlawful, it has never been held essential to allege that the thing was in fact done (*l*); though, supposing it to have been done, it is usual to state the unlawful agreement or conspiracy first, and then to charge the thing done, (or overt act, as it is called,) to have been committed in pursuance of the conspiracy (*m*). It is also observable, that the effect of the state of the law relative to conspiracy is often to render a purpose criminal when concerted by several, which would not be of that character, but at the most the subject

(*k*) 24 & 25 Vict. c. 100, s. 4. (See 27 & 28 Vict. c. 47.) The offender, if the court see fit, may also, either in addition to or in lieu of any other punishment, be bound over with sureties to keep the peace and be of good behaviour. (Sect. 71.)

(*l*) See 9 Rep. 56 b; R. *v.* Kimberty, 1 Lev. 62; R. *v.* Best, Lord Raym. 1167; S. C. Salk. 174; R. *v.* Seward, 1 A. & E. 713.

(*m*) As to the form of the indictment, see R. *v.* Steel, 1 C. & M. 337.

of an action as a civil injury, if entertained merely by an individual; a distinction which rests on very solid ground; for though every wrong may not be of dangerous tendency to the public, yet every coalition to promote wrong is manifestly of that character. Accordingly it is held, that a false and malicious indictment preferred by an individual, is no crime, though it is a cause of civil action (*n*); but if planned by several persons, it is, as we have seen, the legal offence of conspiracy. So a combination among workmen to raise the price of wages, was once deemed to be, in every case, a conspiracy; though the same object, if contemplated by a single workman, would not have been criminal or even actionable (*o*). But so far as regards this particular instance of a conspiracy, the law as to efforts to obtain a rise in wages has been materially altered; for by the Trade Union Act, 1871 (34 & 35 Vict. c. 31), it was enacted, that the purposes of any trade union shall not, by reason merely that they are in *restraint of trade*, be unlawful, so as to render the members liable to prosecution for conspiracy or otherwise (*p*). And again, by statute 38 & 39 Vict. c. 86, that an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act committed by *one* person would not be punishable as a crime; that is to say, an offence either punishable by indictment or by way of summary conviction (*q*).

(*n*) Leith *v.* Pope, 2 Bl. Rep. 1328; see 2 Russ. on Crimes, p. 674.

(*o*) R. *v.* Tailors of Cambridge, 8 Mod. 10; R. *v.* Ridgeway, 5 B. & Ald. 527.

(*p*) By this Act—which also contains provisions for registering trade unions (as to which see The Queen *v.* Registrar of Friendly Societies, Law Rep., 7 Q. B. 741), and confers certain privileges on such as shall be duly enrolled—the Trades Union Protection Act, 1869 (32 & 33 Vict. c. 61), is repealed. The Act of 1871 has been amended in several respects by a later one on the same subject (39 & 40 Vict. c. 22), but not in regard to the matter noticed in the text.

(*q*) This Act repeals the 34 & 35 Vict. c. 32, "amending the criminal

XV. The next offence against the administration of justice which shall be noticed is that of *perjury;* which is stated by Sir E. Coke (*r*) "to be committed, when a "lawful oath is ministered by any that hath authority, "to any person, in any judicial proceeding, who sweareth "absolutely and falsely, in a matter material to the issue "or cause in question." [The common law took no notice of any perjury, but such as is committed in some court having power to administer an oath (or before some magistrate, or proper officer, invested with a similar authority) in some proceedings relative to an action or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them.] But by the express provision of many statutes, it has been enacted that a false oath taken in certain cases, though not of a judicial kind, shall be deemed to amount to perjury, and be visited with the same penalties (*s*).

A mere voluntary oath, however,—that is, an oath administered in a case, and under circumstances, for which the law has not provided,—is not one on which perjury can be assigned; for as such a proceeding is not required, so neither is it protected, by the law. Indeed, such voluntary oaths are expressly prohibited by 5 & 6 Will. IV. c. 62, which provides, that a certain form of declaration may be substituted for them, and that any party falsely making such statutable declaration shall be guilty of a misdemeanor (*t*).

Perjury, according to the above definition, must be *abso-*

"law relating to violence, threats, "and molestation," and makes fresh provision on the subject, for which the reader is referred to the Act itself. (See 38 & 39 Vict. c. 86, s. 7.)

(*r*) 3 Inst. 164.

(*s*) We may remark here, that the penalties of perjury attach to wilful falsehood in an *affirmation* by a *Quaker*, *Moravian*, or *Separatist*. They also attach to the affirmation of a *witness* in lieu of taking an oath, under 17 & 18 Vict. c. 125, s. 20, and 24 & 25 Vict. c. 66; or of a *juror*, under 30 & 31 Vict. c. 35, s. 8.

(*t*) See Report of the Criminal Code Bill Commission, p. 21.

lute, as well as false,—that is, it must be in positive terms. Yet a man will be guilty of the offence, if he swears he believes to be true a fact or statement which he knows to be false (*u*). Perjury must also be *corrupt* or *wilful*, (that is, it must be committed *malo animo*,) not upon surprise or the like (*v*). It must also be, in some point, *material* to the question in dispute (*x*); for if it only be in some trifling collateral circumstance to which no regard is paid, it is no more penal than in the voluntary extra-judicial oaths before mentioned.

Subornation of perjury is the offence of procuring another person, to take such a false oath as would constitute perjury in the principal (*y*).

Perjury and subornation are both misdemeanors; and it may be noticed that any Court, whether civil or criminal, and whether of summary jurisdiction or otherwise, has (in general) the power to direct a witness to be prosecuted for perjury in regard to the evidence he has given in any cause or proceeding had therein (*z*). As to the punishment of perjury, at common law, it has been various (*a*). It was antiently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and, afterwards, fine and imprisonment (*b*). But additional punishments for this offence were from time to time enacted by various statutes. Thus by 5 Eliz. c. 9 an offender convicted of perjury was made liable to be imprisoned for six months and fined 20*l.*; and if convicted of subornation to be fined 40*l.*; and, in default of payment, he was made liable to

(*u*) Pedley's case, 1 Leach, C. C. 365.

(*v*) Hawk. P. C. b. 1, c. 69, s. 2.

(*x*) R. *v.* Aylett, 1 T. R. 69; and see Queen *v.* Bennett, 20 L. J. (M. C.) 217; Queen *v.* Phillpotts, 21 L. J. (M. C.) 18.

(*y*) If the party tampered with does not actually take an oath, the person inciting him so to do, though not guilty of subornation, is still liable to punishment. (Hawk. P. C. b. 1, c. 69, s. 2.)

(*z*) See 14 & 15 Vict. c. 100, s. 19.

(*a*) In some cases, security must be given by the prosecutor for the due prosecution of a charge of perjury. (See 22 & 23 Vict. c. 17; and 30 & 31 Vict. c. 35, s. 1.)

(*b*) 4 Bl. Com. p. 138.

the same period of imprisonment (*c*). And now, under 2 Geo. II. c. 25, and 3 Geo. IV. c. 114, the perjurer or suborner may be sent to the house of correction, with hard labour, for seven years; or (under the same statutes as affected in the punishment by later Acts), may be sentenced to penal servitude for not more than seven nor less than five years (*d*).

[It has been sometimes wished that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, were also rendered capital, upon a principle of retaliation (*e*). And, indeed, where the death of an innocent person has been actually the consequence of such wilful perjury it falls within the guilt of deliberate murder, and deserves an equal punishment; which, it has been said, our antient law in fact inflicted (*f*). But the mere *attempt* to destroy life by other means not being capital, there is no reason that an attempt by per-

(*c*) This statute was at first temporary, but made perpetual by enactments in 29 Eliz. c. 5, and 21 Jac. 1, c. 28. These provisions were repealed by 26 & 27 Vict. c. 125, which also repealed the words at the close of the 5 Eliz. c. 5, limiting its continuance.

(*d*) See 2 Geo. 2, c. 25, s. 2; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47. It is pointed out by the Report of the Criminal Code Bill Commission (p. 21), that whereas "perjury may be "the means of committing what "amounts morally to murder, or "robbery of the worst kind," the "present maximum punishment "(seven years penal servitude) is "not sufficiently severe."

(*e*) In the Report just referred to (p. 21), in connection with the crime of perjury, there is noticed a cognate offence, viz. that of *fabricating evidence*, which (it is observed), "though not so common "as perjury, does occur, and is "sometimes detected." The following instance is given, which, it is stated, "occurred a few years "ago on a trial for shooting at "a man with intent to murder "him, where the defence was that "though the accused did fire off a "pistol it was not loaded with "ball, and the only intent was "to frighten. Evidence was given "that a pistol ball was found "lodged in the trunk of a tree "nearly in the line from where "the accused fired to where the "prosecutor stood. It was after-"wards discovered that the ball "had been placed in the tree by "those concerned in the prosecu-"tion, in order to supply the "missing link in the prosecution."

(*f*) Britton, c. 5. Vide sup. p. 67, n. (*x*).

[jury should be so (*g*); and therefore it seems, except perhaps in the instance of deliberate murder by perjury, sufficiently punished by our present law; which has adopted the opinion of Cicero, derived from the law of the Twelve Tables, "*perjurii pœna divina exitium, humana dedecus*" (*h*).]

XVI. One species of the offence of *bribery* is committed when a judge, or other person concerned in the administration of justice, takes any reward to influence his behaviour in his office (*i*). [In the east, it is the custom never to petition any superior for justice, not excepting even their kings, without a present. This is calculated for the genius of despotic countries, where the true principles of government are never understood; and it is imagined that there is no obligation from the superior to the inferior; no relative duty owing from the governor to the governed. Plato, therefore, more wisely, in his ideal republic, orders those who take presents for doing their duty, to be punished in the severest manner (*j*); and by the law of Athens, he that offered was prosecuted for the offence, as well as he that received a bribe (*k*). The Roman law, though it contained many severe injunctions against bribery,—as well for selling a man's vote in the senate or other public assembly, as for the bartering of common justice;—yet, by a strange indulgence in one instance, it tacitly encouraged this practice; as it allowed the magistrate to receive small presents, provided they did

(*g*) As to attempts to murder, vide sup. p. 77.

(*h*) De Leg. 2, 9. Until recently the *pillory*, which had been abolished in all other cases by 56 Geo. 3, c. 138, was retained for the punishment of perjury and subornation. But this punishment was altogether abolished by 7 Will. 4 & 1 Vict. c. 23. Another consequence that attended a conviction for this crime, until a recent period, was a perpetual disability to bear testimony. But a witness cannot now be excluded from being heard by reason of his having been convicted of crime. Such fact only affects his credibility. (See 6 & 7 Vict. c. 85.)

(*i*) 3 Inst. 145; Hawk. P. C. b. 1, c. 67.

(*j*) De Leg. l. 12.

(*k*) Pott. Antiq. b. 1, c. 23.

[not in the whole exceed one hundred crowns in a year,—not considering the insinuating nature and gigantic progress of this vice when once admitted (*l*). In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, by the same (*m*).] But in judges, it hath always been looked upon as particularly heinous; and there is even a tradition that in the reign of Edward III. Chief Justice Thorpe was hanged for this offence (*n*). [By a statute of the eleventh year of Henry the fourth, all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe; be punished at the king's will; and be discharged from the king's service for ever (*o*). And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, but contaminated with this sordid vice (*p*).

XVII. Another misdemeanor of the same species, is the *negligence of public officers* intrusted with the administration of justice and the maintenance of public order,—

(*l*) Ff. 48, 11, 6.

(*m*) 3 Inst. 147. The Report of the Criminal Code Bill Commission (p. 21) says, in reference to the offence of corruption in *ministerial* officers connected with the administration of justice, that "recent "experience has shown that the "punishment awarded to such of-"fences by the common law, is not "sufficiently severe."

(*n*) Blackstone (vol. iv. p. 140) says he was actually hanged; but Lord Coke (3 Inst. 145) denies that Thorpe was hanged, or could be hanged, for this offence; and Lord Campbell, in his Lives of the Chief Justices (vol. i. p. 91), considers the tradition that sentence of death was actually passed on him, to be unfounded; and to have been invented by Oliver St. John in inveighing against the judges who, in the reign of Charles I., decided in favour of the legality of ship-money.

(*o*) See 3 Inst. 147.

(*p*) It is remarked in the Report just mentioned (p. 20), in reference to the offence of *judicial* corruption, that "as no case of the "kind has occurred (if we except "the prosecutions of Lord Bacon "and Lord Macclesfield) it is not "surprising that the law on the sub-"ject should be somewhat vague." As to the offence of bribery and corruption at *elections*, vide sup. vol. II. p. 376. As to bribery of *custom house officers*, see 39 & 40

[as sheriffs, coroners, constables, and the like,—which makes the offender liable to be fined: and in notorious cases, will amount to a forfeiture of his office, if it be a beneficial one (*q*).

XVIII. There is yet another offence against public justice, which is a misdemeanor of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression* and *tyrannical partiality*, of judges, justices, and other magistrates, in the administration and under the colour of their office. However, when prosecuted,—either by impeachment in parliament, or otherwise, (according to the rank of the offenders), it is sure to be severely punished with forfeiture of office either consequential or immediate; together with fines, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed (*r*).

XIX. Lastly, *extortion* is an abuse affecting the administration of justice; and it consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due. The punishment for this misdemeanor is fine and imprisonment, and sometimes a forfeiture of the office (*s*).]

Vict. c. 36, s. 217; of *excise officers*, 7 & 8 Geo. 4, c. 53, s. 12. As to bribery of *public officers in the East Indies*, see 33 Geo. 3, c. 52, s. 62.

(*q*) Hawk. P. C. b. 1, c. 66; and see R. *v.* Pinney, 3 B. & Ad. 946; R. *v.* Neale, 9 Car. & P. 431.

(*r*) Hawk. P. C. b. 1, c. 68; and see R. *v.* Holland, 5 T. R. 607. Such a prosecution, unless in a case of parliamentary impeachment, would take place by information in the Queen's Bench Division of the High Court of Justice.

(*s*) See 3 Edw. 1, c. 26; 3 Inst. 145; R. *v.* Gilham, 6 T. R. 265; R. *v.* Jones, 2 Camp. 131. As to extortion by British subjects in the East Indies, in receiving gifts, see 33 Geo. 3, c. 52, s. 62; Re Capt. Douglas, 3 Q. B. 825; Douglas *v.* Queen, 13 Q. B. 74. And see on the subject of extortion in general, Bac. Abr. tit. Fees; Jac. L. Dict. Extortion, &c.

CHAPTER IX.

OF THE MEANS OF PREVENTING OFFENCES.

[WE are now arrived at the fifth general branch or head, under which we were to consider the subject of this Book of our Commentaries (*a*): viz., the means of *preventing* the commission of crimes and misdemeanors: and really it is an honour, and almost a singular one, to our English laws, that they furnish a title of this sort; since *preventive* justice is, upon every principle of reason, of humanity and of sound policy, preferable, in all respects, to *punishing* justice (*b*); the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

This preventive justice chiefly consists in obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen: and that, by their finding pledges, or securities, for keeping the peace; or for their good behaviour (*c*).

By the Saxon constitutions these sureties were always at hand, by means of King Alfred's wise institution of decennaries or frank pledges; wherein, as has more than once been observed, the whole neighbourhood, or tithing,

(*a*) Vide sup. p. 2.

(*b*) Beccar. ch. 41.

(*c*) The 34 & 35 Vict. c. 112, is entitled "An Act for the more effectual Prevention of Crime," but its provisions do not come within the scope of this chapter. They have reference chiefly to convicts holding *licences* under the Penal Servitude Acts; the better *identification* of criminals; and the punishments of persons *twice convicted* of crime.

[of freemen were mutually pledges for each other's good behaviour (*d*). But this great and general security being now fallen into disuse and neglected, there hath succeeded to it the method of making suspected persons find particular and special securities for their future conduct; of which we find mention in the laws of King Edward the Confessor; "*tradet fidejussores de pace et legalitate tuendâ*" (*e*).

This security is either for *keeping the peace*, or for *good behaviour;* and consists in being bound with one or more securities in a recognizance or obligation to the Crown, and taken in some court, or by some judicial officer (*f*); whereby the party bound acknowledges himself to be indebted to the Crown in the sum required, (for instance 100*l.*,) with condition to be void and of none effect if he shall appear in court on such a day, and in the mean time

(*d*) Vide sup. vol. I. p. 122.

(*e*) Cap. 18. It is said in Willis *v.* Bridges, 2 B. & Ald. 287, that the authority of a justice of the peace, to take security for the peace, appears to have had its origin in stat. 1 Edw. 3, st. 2, c. 16, and that this authority is more fully set forth in 34 Edw. 3, st. 1.

(*f*) It may be remarked that in all cases where a justice of the peace is authorized to bind a person, or make him give security, he may do so by *recognizance*. (2 Arch. Just. 350.) And such cases may arise under other circumstances than those mentioned in the text. Thus, the court of summary jurisdiction (that is to say, the justice or justices) before whom any person has been charged with an indictable offence and before whom witnesses in support of such charge have been examined, may bind by recognizance the prosecutor and every such witness (as well as any witnesses called by the person accused) to prosecute and give evidence at the trial. (See 11 & 12 Vict. c. 42, ss. 20, 21, 22, 23, 24, and 30 & 31 Vict. c. 35, ss. 3, 4.) And in the case of any charge or complaint of any offence punishable by such court, it may bind over the defendant to appear at the hearing. (See 11 & 12 Vict. c. 43, ss. 3, 9, 13, 16, 20.) And whenever such a court has fixed the amount in which the principal and surety (if any) are to be bound, the recognizance may be taken before such persons as are specified in the 42 & 43 Vict. c. 49, s. 42. See also 19 & 20 Vict. c. 16, ss. 8—10, 22, 23, and 25 & 26 Vict. c. 65, ss. 9, 17, as to recognizances where an indictment or inquisition has been removed for trial to the Central Criminal Court. Et vide post, p. 291, as to recognizances *after* a conviction for felony or misdemeanor.

[shall keep the peace either generally, towards the sovereign and all his liege people; or particularly also, with regard to the person who craves the security. Or, the condition of the recognizance may be to keep the peace for a certain period, not dependent on any appearance in court (*g*). Or if it be for the good behaviour,—then on condition that the party bound shall demean and behave himself well, or be of good behaviour, either generally or specially, for the time therein limited; as for one or more years, or even for life (*h*): and if the condition of such recognizance be broken, by any breach of the peace in the one case; or by any misbehaviour, in the other; the recognizance becomes forfeited or absolute; and the party and his sureties become the Crown's absolute debtors, for the several sums in which they are respectively bound (*i*).

Any justices, by virtue of their commission (and also the *ex officio* conservators of the peace, mentioned in a former volume,) may demand such security according to their own discretion (*k*): or it may be granted at the request of any subject, upon due cause shown,—provided such demandant be under the Crown's protection: for which reason it was formerly doubted whether Jews, pagans, or persons convicted of a *præmunire*, were entitled thereto (*l*). Or if the justice is averse to act, it may be obtained by a mandatory writ, called a *supplicavit*,—which will compel the justice to act as a ministerial, and not as a judicial, officer; and he must

(*g*) Where taken for appearance in court (as it usually is), the justices must, by 3 Hen. 7, c. 1, certify the recognizance to the next session, there to remain of record. (See Willis *v.* Bridges, 2 B. & Ald. 287.)

(*h*) Hawk. P. C. b. 1, c. 60, s. 15.

(*i*) As to the forfeiture of recognizances, the following statutes and cases may be consulted: 3 Geo. 4, c. 46; 4 Geo. 4, c. 37; 7 & 8 Geo. 4, c. 64, s. 31; 3 & 4 Will. 4, c. 99; 2 & 3 Vict. c. 71, s. 45; 20 & 21 Vict. c. 43, s. 13; R. *v.* Justices of West Riding, 7 A. & E. 583; R. *v.* Twyford, 5 B. & Ald. 430.

(*k*) As to *ex officio* conservators of the peace, vide sup. vol. II. p. 644. A secretary of state or privy councillor, however, cannot, as it would seem, bind to keep the peace or good behaviour. (11 St. Tr. 317.)

(*l*) Hawk. P. C. b. 1, c. 60, s. 3.

[make a return of such writ, specifying his compliance, under his hand and seal (*m*). But this writ is seldom used; for when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I. c. 8.] And in this case, as well as where application is made to the court of quarter sessions, it is founded upon *articles* first exhibited in court, and supported by the oath of the exhibitant (*n*); the truth of which articles cannot be controverted (*o*). But where the parties live in the country at a distance from London, the Queen's Bench Division will not in general entertain an application of this description; which it is usual, in such case, to make to a justice of the peace in the neighbourhood, or to the court of quarter sessions (*p*). [A peer or peeress, however, cannot be bound over either by justices or at quarter sessions; though a justice of the peace has power to require sureties of any person *under* the degree of nobility,—whether he be a fellow justice or other magistrate, or whether he be merely a private man (*q*). Wives may demand it against their husbands, or husbands (if necessary) against their wives (*r*). But infants ought to find security by their friends only, and not to be bound themselves; for they are incapable of engaging themselves to answer any debt; which, as we have observed in a former place, is the nature of these recognizances or acknowledgments (*s*).

Thus far, what has been said is applicable to both species of recognizances: for the *peace*, and for the *good behaviour*. But as these two species of securities are in some respects different,—especially as to the cause of granting or the means of forfeiting them,—it may be useful next to consider them separately.

(*m*) F.N.B. 80; Clavering's case, 2 P. Wms. 202.

(*n*) See Ex parte Williams, M'Clel. 493; 12 Price, 673; Regina *v.* Mallinson, 1 L. M. & P. 619.

(*o*) R. *v.* Doharty, 13 East, 171.

(*p*) R. *v.* Waite, 2 Burr. 780; Chitty's Burn, Surety of the Peace.

(*q*) Hawk. P. C. b. 1, c. 60, s. 5.

(*r*) Sim's case, 2 Stra. 1207.

(*s*) Vide sup. vol. II. p. 142.

[1. Any justice of the peace may *ex officio* bind by recognizances, with sureties to keep the peace, all who in his presence make any affray, or threaten to kill or beat one another; or who contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people. He may also bind all such as he knows to be common barrators; and such as are brought before him by the constable for a breach of the peace in his presence: and all such persons as having been before bound to the peace, have broken it, and forfeited their recognizances (*t*). Also wherever any private man has just cause to fear that another will burn his house; or do him a corporal injury, by killing, imprisoning, or beating him: or that he will procure others so to do;—he may demand surety of the peace against such person: and every justice of the peace is bound to grant such surety, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will show that he has just cause to be so by reason of the other's menaces, attempts, or having lain in wait for him (*u*); and will also further swear that he does not require such surety out of malice or for mere vexation (*v*). This is called *swearing the peace* against another; and if the party does not find such sureties, he may immediately be committed till he does (*x*).] It is however provided by 16 & 17 Vict. c. 30, s. 3, that no person committed to prison for such cause, under any warrant or order of one justice of the peace, shall be detained there for a longer period than twelve calendar months.

[Such recognizance for keeping the peace, when given, may be forfeited by any actual violence,—or even an assault or menace, to the terror of him who demanded it,—provided it be a special recognizance. And, if the recognizance be general, then by any unlawful action

(*t*) Hawk. P. C. b. 1, c. 60, s. 1.

(*u*) See Ex parte Hulse, 21 L. J. (M. C.) 21.

(*v*) Hawk. P. C. ubi sup. s. 8.

(*x*) Ib. s. 9. See Prickett *v.* Gratrex, 8 Q. B. 1020.

[whatever, that either is or tends to be a breach of the peace; or by any private violence, committed against any of the subjects of the Crown. But a bare trespass upon the lands or goods of another,—though ground for a civil action,—unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance (*y*). Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance (being looked upon to be merely the effect of unmeaning passion and heat), unless they amount to a challenge to fight (*z*).

2. The other species—viz. a recognizance, with sureties, for the *good abearance* or *good behaviour*, includes security for the peace and somewhat more; we will therefore examine it, in the same manner as the other.

First, then, the justices are empowered by the statute, 34 Edward III. c. 1, to bind over to the good behaviour towards the sovereign and his people, all them *that be not of good fame*, wherever they are found: to the intent that the people be not troubled or endamaged; nor the peace diminished: nor merchants and others passing by the highways of the realm, disturbed or put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem;* as for haunting bawdy houses with women of bad fame, or for keeping such women in his own home: or for words tending to scandalize the government; or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day and wake in the night; common drunkards; whore masters; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring

(*y*) Hawk. P. C. b. 1, c. 60, s. 25. (*z*) Ib. s. 22.

[them within the general words of the statute,—as persons not of good fame; an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one (*a*).] And there is a similar limitation as to the period of detention in prison under the warrant of a single justice, as we mentioned in reference to a binding over to keep the peace (*b*).

[A recognizance for the good behaviour may be forfeited by all the same means, as one for the security of the peace may be: and also by some others;—as by speaking words tending to sedition; or by committing any of those acts of misbehaviour which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion, of that which perhaps may never actually happen (*c*); for though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.]

Such are the doctrines laid down in the books with respect to recognizances for *good behaviour*. In what manner, however, and to what extent the provisions of the 34 Edward III. ought at the present day to be enforced, may be doubtful: and justices, even at sessions, are recommended, by a learned writer on the subject, to refrain from acting under this statute of their own motion, and where no complaint, requiring such recognizance to be taken, has been made: except indeed where a conviction for some offence of a dangerous kind has taken place, and the circumstances are such as to render its repetition by the same offender a probable event (*d*).

It is to be observed, moreover, that these powers when

(*a*) Hawk. P. C. b. 1, c. 62, s. 4.
(*b*) 16 & 17 Vict. c. 30, s. 4; vide sup. p. 288.
(*c*) Sect. 5.
(*d*) See 2 Arch. Just. 454.

exercised by a court of summary jurisdiction upon complaint made must, by 42 & 43 Vict. c. 49, s. 25, be by an order under the provisions of the Summary Jurisdiction Acts; so that the complainant and defendant and witnesses may be called and examined and cross-examined and the parties subject to costs, as in other cases; and the defendant, should he disobey the order, may be imprisoned for six months or fourteen days, according as the court is a petty sessional court or otherwise (*e*).

In reference to cases of *conviction*, additional facilities for the prevention of crime, by the use of recognizances for the peace and good behaviour, have been now afforded by the legislature. For a provision was inserted in the Criminal Law Consolidation Acts of the year 1861, to the following effect (*f*); viz., that whenever any person shall be convicted of *an indictable misdemeanor*, punishable under any of those statutes respectively, the court may, if it shall think fit, in addition to or *in lieu* of any of the punishments authorized by the Act, fine the offender and require him to enter into his own recognizances and to find sureties either for keeping the peace or for being of good behaviour, or both; and in the case of a *felony*, punishable under any of such Acts respectively, may require the offender to enter into such recognizances and to find sureties (both or either), in addition to any punishment authorized by the Act under which he has been convicted. There is however a proviso that no person is to be kept in prison under this clause, for not finding sureties, for any period exceeding one year.

(*e*) A "court of summary jurisdiction," for the purposes of this Act, is by sect. 50 defined as any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given, or who is or are authorized to act under the Summary Jurisdiction Acts. And a "petty sessional court" is (by sect. 20) defined to be two or more justices when sitting in a place wherein justices are accustomed to assemble, or which has been for the time a place appointed for the purpose of holding special or petty sessions.

(*f*) See 24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; c. 100, s. 71.

CHAPTER X.

OF COURTS OF A CRIMINAL JURISDICTION.

[THE last object of our inquiries will be the method of *inflicting* those punishments, which the law has annexed to particular offences; and which, in this treatise, have been constantly subjoined to the description of the crime itself (*a*). In the discussion of these, we shall, in the first place, point out the several courts of criminal jurisdiction wherein offenders may be prosecuted to punishment: and then explain the several proceedings which may be had therein. And in reckoning up the several courts of criminal jurisdiction, we shall begin with an account of such as are of a public and general jurisdiction throughout the whole realm: and afterwards proceed to such as are only of a private and special jurisdiction, and confined to some particular parts of the kingdom.

First. As to the criminal courts of *public and general jurisdiction*;—with regard to which we shall, in one respect, pursue a different order, from that in which we considered the civil tribunals. For there, as the several courts had a gradual subordination to each other,—the superior correcting and reforming the errors of the inferior,—it seemed proper to begin with the lowest, and to ascend gradually to those of more extensive powers (*b*). But as it is contrary to the genius and spirit of the law of England to suffer any man twice to be tried for the same offence in a criminal way, especially if acquitted upon the first trial,—therefore these criminal courts may be said to

(*a*) Vide sup. p. 2. (*b*) Vide sup. bk. v. c. IV.

[be all independent of each other; at least so far as that the sentence of the lowest of them can never be controlled or reversed by the highest jurisdiction in the kingdom, unless for error in matter *of law* (*c*); though sometimes causes may be removed from one to the other, before trial. And, therefore, as in these courts of criminal cognizance, there is not the same chain and dependence as in the others, it is proposed to rank them according to their dignity, and begin with the highest of all, viz.—

1. The High Court of *Parliament;* which is the highest court in the kingdom, not only for the making but also for the execution of laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for Acts of parliament to attaint particular persons of treason or felony,—or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose,—we speak not of them; such being to all intents and purposes new laws, made *pro re natâ*, and by no means an execution of such as are already in being. But an impeachment before the lords, by the commons of Great Britain in parliament, is a prosecution of the already known and established law, and has been frequently put into practice,—being a presentment to the most high and supreme court of criminal jurisdiction, by the most solemn grand inquest of the whole kingdom (*d*). A commoner cannot, however, be impeached before the lords for any capital offence, but only for high misdemeanors; a peer may be so impeached, for any crime (*e*). And it has been

(*c*) As to reserving questions of law, arising at assizes or sessions, for the consideration of the judges, see 11 & 12 Vict. c. 78, and 38 & 39 Vict. c. 77, s. 19. And as to cases stated by justices of the peace, on the application of any person aggrieved by their determination in point of law, in the exercise of their summary jurisdiction, see 20 & 21 Vict. c. 43, 35 & 36 Vict. c. 26, and 42 & 43 Vict. c. 33. See also Re Ellershaw, Law Rep., 1 Q. B. D. 481.

(*d*) 1 Hale, P. C. 150.

(*e*) When, in the fourth year of Edward the third, the king demanded the earls, barons and peers

[customary, (in the case of an impeachment of a peer for treason,) to address the Crown to appoint a Lord High Steward for the greater dignity and regularity of the proceedings; which High Steward was formerly elected by the peers themselves, though he was generally commissioned by the sovereign. But it hath in modern times been strenuously maintained, that the appointment of a High Steward in such cases is not indispensably necessary, but that the House may proceed without one (*f*). The articles of impeachment are a kind of bill of indictment, found by the house of commons, and afterwards tried by the house of lords; who are, in cases of misdemeanor, considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitutions of the antient Germans; who, in their great councils, sometimes tried capital accusations relating to the public: "*licet apud concilium accusare*

to give judgment against Simon de Bereford, who had been a notorious accomplice in the treasons of Roger Earl of Mortimer, they came before the king in parliament and said all with one voice, that the said Simon was not their *peer;* and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and give judgment against him, a solemn protest and proviso in respect of the offender not being a peer was entered in the parliament roll. (Rot. Parl. 4 Edw. 3, n. 2 and 6; 2 Brad. Hist. 190; Selden, Judic. in Parl. c. 1.) But Mr. Christian says in his edition of Blackstone (vol. iv. p. 260), that, according to the last resolution of the house of lords, a commoner *may* be impeached for a capital offence. And he mentions, on the authority of the Journals of the House of Lords, the case of Sir Adam Blair and four other commoners, who, on the 26th June, 1689, were impeached for high treason, in having published a proclamation of James the second. (14 Lords' Journ. p. 260.) Mr. Christian adds that this impeachment was not prosecuted with effect, on account of an intervening dissolution of the parliament. See also Lives of the Chancellors, by Lord Campbell, vol. iii. p. 357, n.; the observations of Sir Erskine May on this subject, in his Law of Parliament; and the case of The Queen *v.* Boyes, 1 Best & Smith, p. 324.

(*f*) As to the appointment of the High Steward, see 1 Hale, P. C. 350; Lords' Journ. 12th May, 1679; Com. Journ. 15th May, 1679; Fost. 142, &c.

[*quoque, et discrimen capitis intendere*" (*g*). And it has a peculiar propriety in the English constitution, which has much improved upon the antient model, imported hither from the continent. For, though, in general, the union of the legislative and judicial powers ought to be most carefully avoided: yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people; and be guilty of such crimes as the ordinary magistrate, either dares not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly *judge;* because their constituents are the parties injured: and therefore can only *impeach.* But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason, therefore, will suggest, that this branch of the legislature, which represents the people, must bring its charge before the other branch,—which consists of the nobility,—who have neither the same interests nor the same passions as popular assemblies (*h*). This is a vast superiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics; where the people were, at the same time, both accusers and judges. It is proper that the nobility should judge, to ensure justice to the accused; as it is proper that the people should accuse, to ensure justice to the commonwealth. And, therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature; which was insisted upon by the house of commons in the case of the Earl of Danby, in the reign of Charles the second (*i*); and which is now established by the Act of Settlement (*k*).] This is, that no pardon under the Great Seal shall be pleadable to an impeachment by the commons of Great

(*g*) Tacit. de Mor. Germ. 12.
(*h*) Montesq. Sp. L. xi. 6.
(*i*) Com. Journ. 5th May, 1679.
(*k*) 12 & 13 Will. 3, c. 2.

Britain in parliament, so as to prevent its further prosecution (*m*); though such a pardon would be pleadable in bar, (as we shall see hereafter,) in the case of an ordinary indictment.

Before this Court, also, is tried any peer or peeress against whom an *indictment* for treason or felony, or for misprision of either, is found, during a session of parliament either by a grand jury of freeholders in the Queen's Bench division (or at the assizes under a commission of *oyer and terminer*,)—such indictment being removed hither by writ of *certiorari* (*n*).

2. [The Court of the *Lord High Steward* of Great Britain, is instituted for the trial during the *recess* of parliament, of peers or peeresses indicted for treason or felony (*o*); or for misprision of either (*p*). The office of this great magistrate is very antient; and was formerly hereditary, or at least held for life, or *dum bene se gesserit:* but now it is usually, and hath been for many centuries past (*q*), granted *pro hâc vice* only; and it hath been the constant practice, (and therefore seems now to have become necessary,) to grant it to a lord of parliament, else he is incapable to try such delinquent peer (*r*).] When, therefore, an indictment has been found (during such recess) in the Queen's Bench division or at the assizes against one having the privilege of peerage, it

(*m*) See The Queen *v.* Boyes, 1 B. & Smith, per cur. 382.

(*n*) 4 Bl. Com. p. 262; Bac. Ab. Courts (G); Com. Dig. Parliament (L. 13). The last occasion of such a trial was in the year 1841, when the Earl of Cardigan was tried before the House of Lords for felony, in shooting at Captain Tuckett. An account of the proceedings will be found in the 83rd volume of the Annual Register.

(*o*) 4 Inst. 58; Hawk. P. C. b. 2, c. 2, s. 44; 2 Jon. 54.

(*p*) R. *v.* Lord Vaux, 1 Bulst. 198.

(*q*) Pryn. on 4 Inst. 46.

(*r*) "*Quand un seigneur de parlement serra arrein de treason ou felony, le roy par ses lettres patents fera un grand et sage seigneur d'estre le grand seneschal d'Angleterre: qui doit faire un precept, pur faire venir xx seigneurs, ou xviii,*" &c. (Yearb. 13 Hen. 8, 11.) (See Saundf. P. C. 152; 3 Inst. 28; 4 Inst. 59; Hawk. P. C. b. 2, c. 2; Barr. 234.

is to be removed by a writ of *certiorari* into the court of the Lord High Steward: which, only, has power to determine it (*s*). But this is only in case the offence be of the description before mentioned, viz. treason, felony, or misprision of treason or felony; for if it be of any other kind, the privilege does not exist, and the peer must be tried by jury in the court in which the indictment is found (*t*). [A peer may plead a pardon before the Queen's Bench: and the judges thereof have power to allow it; in order to prevent the trouble of appointing a High Steward, merely for the purpose of receiving such plea. But he may not plead, therein, any other plea; as *guilty* or *not guilty*, of the indictment; but only in the court of the Lord High Steward. And this because in consequence of such plea, it is possible that judgment of death might be awarded against him. The sovereign, therefore, in case a peer be indicted for treason, felony, or misprision, creates a Lord High Steward, *pro hâc vice*, by commission under the Great Seal; which recites the indictment so found, and gives his Grace power to receive and try it, *secundùm legem et consuetudinem Angliæ*. Then, when the indictment is regularly removed by writ of *certiorari*, commanding the inferior court to certify it up to him,—the Lord High Steward directs a precept to a serjeant-at-arms, to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers. Afterwards the number came to be indefinite: and the

(*s*) Lord Coke says, (3 Inst. 30,) "that this privilege cannot be "waived by the peer indicted;" but Hawkins (P. C. b. 2, c. 44, s. 19) holds that it is waived if he puts himself upon his country; that is, pleads not guilty, and refers the issue to a trial by jury. Under 19 & 20 Vict. c. 16, the Queen's Bench division is empowered to order certain indictments to be tried in the Central Criminal Court; but, by the twenty-ninth section of the Act, it is not to apply to any indictment or inquisition charging any peer or peeress (or other person claiming the privilege of peerage) with any offence not now lawfully triable at any court of oyer and terminer or gaol delivery.

(*t*) 2 Inst. 49; 3 Inst. 28, 30; R. v. Lord Vaux, 1 Bulst. 197.

[custom then was, for the Lord High Steward to summon as many as he thought proper, (but latterly not less than twenty-three;) and that those lords only should sit upon the trial (*u*): which threw a monstrous weight into the hands of the Crown, and this its great officer, of selecting only such peers as the then predominant party should most approve of. And accordingly, when the Earl of Clarendon fell into disgrace with Charles the second, there was a design formed to prorogue the parliament, in order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court (*x*).]

But now by statute 7 & 8 Will. III. c. 3, upon all trials of peers or peeresses for treason or misprision,—all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein: and every lord appearing, and taking the proper oaths, shall vote in the trial of such peer (*y*). The decision in this court is by the majority; but a majority cannot convict, unless it consists of twelve or more (*z*).

During the session of parliament, then, the trial of an indicted peer, is not in the court of the Lord High Steward, but before the peers in the high court of parliament (*a*). It is true (as already mentioned) that [a Lord High Steward is always appointed in that case also, to regulate and add weight to the proceedings: but he is there rather in the nature of a speaker *pro tempore*, or chairman of the court, than the judge of it: for the collective body, the peers, are therein the judges both of law and fact; and the High

(*u*) Kelynge, 56.

(*x*) Carte's Life of Ormonde, vol. ii.

(*y*) Mr. Christian, in his edition of Blackstone, remarks that inasmuch as a peer cannot have the benefit of a challenge like a commoner, (1 Harg. St. Tr. 198, 388,) it is somewhat surprising that this manifest improvement of the law and constitution, was not extended to trials of peers for *all* felonies in the court of the lord high steward.

(*z*) Christian's Blackstone, vol. iv. p. 262, note.

(*a*) Vide sup. p. 293; Fost. 141.

[Steward has a vote with the rest, in right of his peerage. But in his own court, the Lord High Steward is the sole judge of matters of law, as the lords triers are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial (*b*). And upon the conviction and attainder of a peer for murder, in full parliament,—it hath been holden by the judges, that in case the day appointed in the judgment for execution should lapse before execution done, a new time for it may be appointed by the high court of parliament (during its sitting) though no High Steward be existing; or, (in the recess of parliament,) by the queen's bench,—the record being, for such purpose, removed thereto (*c*).

It has been a point of some controversy, whether the bishops have now a right to sit in the court of the Lord High Steward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of King William (*d*), "all peers who have a right to sit and vote in parliament," but the expression had been much clearer if it had been "all *lords*," and not "all *peers;*" for though bishops, on account of the baronies annexed to their bishoprics, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility; and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments and indictments in full parliament, much less in the court we are now treating of: for, indeed, they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable, that in the eleventh chapter of the

(*b*) St. Tr. vol. iv. 214, 232, 233. See Lord Campbell's Lives of the Chancellors, vol. iii. p. 557, n.

(*c*) Fost. C. L. 139.

(*d*) 7 & 8 Will. 3, c. 3.

[Constitutions of Clarendon, made in the parliament of the eleventh year of Henry the second, they are expressly excused, rather than excluded, from sitting and voting on trials, when they come to concern life or limb: "*episcopi, sicut cæteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem:*" and Becket's quarrel with the king hereupon, was not on account of the exception, (which was agreeable to the canon law,) but of the general rule, which compelled the bishops to attend at all. And the determination of the house of lords in the Earl of Danby's case (*e*), which has ever since been adhered to, is consonant with these constitutions: "that the lords spiritual "have a right to stay and sit in court in capital cases, "till the court proceeds to the vote of guilty, or not "guilty" (*f*). It must be noted that this resolution extends only to trials *in full parliament;* for to the court of the Lord High Steward, (in which no vote can be given, but merely that of guilty or not guilty,) no bishop, as such, ever was or could be summoned; and though the statute of King William regulates the proceedings in that court as well as in the court of parliament, yet it never intended to new-model or alter its constitution: and consequently does not give the lords spiritual any right in cases of blood, which they had not before (*g*). And what makes their exclusion more reasonable is, that they have no right to be tried themselves in the court of the Lord High Steward; and therefore, surely, ought not to be judges there (*h*). For the privilege of being thus tried depends upon nobility, rather than a seat in the house; as appears from the trial of popish lords, while incapable of a seat there; of lords under age; and of the Scots no-

(*e*) Lords' Journ. 15 May, 1679.

(*f*) This applies, it will be observed, only to judicial proceedings. Where the proceeding is a *legislative* one, as in the case of a bill of attainder, the bishops are entitled to remain till the end. (See May, Law of Parl. p. 690.)

(*g*) Fost. 248.

(*h*) See Bro. Ab. tit. Trial, 142.

[bility, though not in the number of the sixteen representative peers: and from the trial of females; such as the queen consort or dowager, and of all peeresses by birth; and of peeresses by marriage also, unless they have, when dowagers, disparaged themselves by taking a commoner to their second husband.]

3. The High Court of Justice on the crown side of the Queen's Bench Division takes cognizance of all criminal causes,—from treason, down to the most trivial misdemeanor or breach of the peace (*i*). And not only may indictments be found therein by a grand jury and other presentments made (*k*), but hither also may indictments from all inferior courts be removed by writ of *certiorari:* though (under the provisions of the statute 16 & 17 Vict. c. 30) the removal can only take place either where the indictment in the court below is against a body corporate, or else where it is made to appear to the High Court, by the party applying for the writ, that a fair and impartial trial cannot otherwise be had; or else that a question of law of more than usual difficulty and importance is likely to arise upon the trial; or else that a view of premises, or a special jury, may be required for the satisfactory trial of the case (*l*). The manner of trial in the Queen's Bench Division is, in felony or treason, *at bar*, that is, before the judges of the court sitting

(*i*) To this Division of the High Court of Justice, are assigned all causes and matters (criminal as well as civil) which at the date of the Judicature Act, 1873, were within the exclusive cognizance of the Court of Queen's Bench (see 36 & 37 Vict. c. 66, s. 34). And the practice and procedure in all criminal causes and matters, both in such High Court and in the Court of Appeal respectively, are in general the same as then prevailed. (See 38 & 39 Vict. c. 77, s. 19.) An account of the establishment of the Supreme Court of Judicature will be found in bk. v. ch. v.

(*k*) Accordingly a *grand jury* of the county of Middlesex may be summoned to attend the Queen's Bench Division, in order to dispose of any indictments which may be preferred therein; but this summons takes place only where the master of the crown office has received due notice of some business to be brought before the Court. (See 35 & 36 Vict. c. 52.)

(*l*) 16 & 17 Vict. c. 30, s. 4. As to the leave and recognizance required before the writ is allowed, see also post, ch. xv.

in *banc* (*m*); and in misdemeanors, it is either at bar (in cases of sufficient consequence) or else at *nisi prius* (*n*). [The judges of this court are the supreme coroners of the kingdom; and it is the principal tribunal of criminal jurisdiction, which is known to the laws of England; though the High Court of Parliament and the Court of the Lord High Steward, of which we have already spoken, are of greater dignity. For which reason, when the Court of Queen's Bench was removed to Oxford on account of the sickness in 1665, it was held that all the then subsisting commissions of *oyer* and *terminer* and general gaol delivery in that county, were at once absorbed and determined *ipso facto* (*o*): in the same manner as by the old Gothic and Saxon constitutions, "*obtinuit quievisse omnia inferiora judicia, dicente jus rege*" (*p*).]

Into the Queen's Bench Division of the High Court of Justice [hath reverted all that was good and salutary of the jurisdiction of the court of *Star-chamber*, *camera stellata* (*q*); which was a court of very antient

(*m*) Woolrych's Crim. Law, p. 162. As to a trial at bar for perjury, see The Queen *v.* Castro, Law Rep., 9 Q. B. 350.

(*n*) Where the record is in the Queen's Bench Division, either prosecutor or defendant may apply for a *special* jury. This, however, can only be in cases of misdemeanor, and not of treason or felony (6 Geo. 4, c. 50, s. 30). It may be remarked that, in certain cases, when the record is in the Queen's Bench Division, the trial is neither at bar nor at *nisi prius*, but at the *Central Criminal Court*, under the provisions of 19 & 20 Vict. c. 16 (vide post, ch. XV.).

(*o*) But see 25 Geo. 3, c. 18, and 9 Geo. 4, c. 9.

(*p*) Stiernh. l. 1, c. 2.

(*q*) This is said (Lamb. Arch. 154) to have been so called, either from the Saxon word ȝteoȝan, to steer or govern; or from its punishing the *crimen stellionatus*, or cozenage; or because the room wherein it sat, the old council chamber of the Palace of Westminster (Lamb. 148), was full of windows; or (to which Sir Edward Coke, 4 Inst. 66, accedes) because *haply* the roof thereof was at first furnished with gilded *stars*. As all these (says Blackstone, vol. iv. p. 266, *in notis*,) are merely conjectures (for no stars are now in the roof, nor are any said to have remained there so late as the reign of Elizabeth), it may be allowable to propose another conjectural etymology, as plausible perhaps as any of them. It is well known that, before the banishment of the Jews under Edward the first, their contracts and

[original (*r*);—re-modelled by statutes 3 Henry VII. c. 1, and 21 Henry VIII. c. 20,—consisting of divers lords spiritual and temporal, (being privy councillors,) together with two judges of the courts of common law; without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious misdemeanors, contrary to the laws of the land. Yet this was afterwards, as Lord Clarendon informs us, stretched "to the asserting of all "proclamations and orders of state; to the vindicating of "illegal commissions, and grants of monopolies; holding "for honourable that which pleased, and for just that

obligations were denominated in our antient records *starra* or *starre*, from a corruption of the Hebrew word *shetâr*, a covenant (Tovey's Angl. Judaic. 32; Seld. Tit. of Hon. ii. 34; Uxor. Ebraic. i. 14). These starrs, by an ordinance of Richard the first, preserved by Hoveden, were commanded to be enrolled, and deposited in chests under three keys in certain places: one, and the most considerable, of which was in the King's Exchequer at Westminster; and no starr was allowed to be valid, unless it was found in some of the said repositories (Memorand. in Scacc. P. in the sixth year of Edward the first, prefixed to Maynard's Year Book of Edward the second, fol. 8; Madox, Hist. Exch. c. 7, ss. 4, 5, 6). The room at the Exchequer where the chests containing these starrs were kept, was probably called the *starr-chamber;* and, when the Jews were expelled the kingdom, was applied to the use of the king's council, sitting in their judicial capacity. To confirm this, the first time the star-chamber is mentioned in any record, it is said to have been situated near the receipt of the Exchequer at Westminster; (the king's council, his chancellor, treasurer, justices and other sages, were assembled "*en la chambre des esteilles pres la resceipt al Westminster*"—Claus. 41 Edw. 3, m. 13). For in process of time, when the meaning of the Jewish *starrs* was forgotten, the word *star-chamber* was naturally rendered in law French *la chambre des esteilles*, and in law Latin *camera stellata;* which continued to be the style in Latin, till the dissolution of that court.

It is remarked by Mr. Christian (Bl. Com. vol. iv. p. 267), in reference to the above note of Blackstone, that in one of the statutes of the University of Cambridge (*De computatione procuratorum*, Stat. Acad. Cant. p. 32), the antiquity of which is not known, the word *starrum* is twice used for a schedule or inventory.

(*r*) Lamb. Arch. 156.

[" which profited; and becoming both a court of law to " determine civil rights, and a court of revenue to enrich " the treasury; the council table by proclamations enjoin- " ing to the people that which was not enjoined by the " laws, and prohibiting that which was not prohibited; " and the Star-Chamber, which consisted of the same " persons in different rooms, censuring the breach and " disobedience to those proclamations by very great fines, " imprisonments, and corporal severities; so that any " disrespect to any acts of state, or to the persons of states- " men, was in no time more penal, and the foundations of " right never more in danger to be destroyed" (*s*). For which reasons it was finally abolished by statute 16 Car. I. c. 10, to the general joy of the whole nation (*t*).]

It is to be noticed that the jurisdiction of the High Court of Justice, as exercised on the crown side of the Queen's Bench division, includes the criminal jurisdiction of the *Court of Admiralty*, of which court (as now forming part of the High Court of Justice) we spoke in a former volume (*u*). In virtue of such criminal jurisdiction (*x*), the

(*s*) Hist. of Rebellion, bb. 1 and 3.

(*t*) The just odium into which this tribunal had fallen before its dissolution has been the occasion that few memorials have reached us of its nature, jurisdiction, and practice; except such as, on account of their enormous oppression, are recorded by the historians of the times. There are, however, to be met with some reports of its proceedings in Dyer, Croke, Coke, and other reporters of that age; and some in manuscript, of which Sir W. Blackstone possessed two: one from the fortieth year of Elizabeth, to the thirteenth of James the first; the other for the first three years of King Charles. And there is in the British Museum (Harl. MS. vol. 1, no. 1226) a very full, methodical and accurate account of the constitution and course of this court, compiled by William Hudson, of Gray's Inn, an eminent practitioner therein; and a short account of the same, with copies of all its process, may also be found in 18 Rym. Fœd. 192, &c. Hudson's Treatise of the Court of Star-Chamber, is now published at the beginning of the second volume of Collectanea Juridica.

(*u*) Vide sup. bk. v. c. v.

(*x*) See 4 Inst. 134, 147.

High Court of Admiralty, as it used to be held before the Lord High Admiral of England or his deputy, (styled the judge of the Admiralty,) originally [had cognizance of all crimes and offences committed either upon the sea or on the coasts, out of the body or extent of any English county; and by stat. 15 Ric. II. c. 3, acquired cognizance of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens; such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But inasmuch as the Court of Admiralty proceeded without jury, in a method much conformed to the civil law, the exercise of its criminal jurisdiction was contrary to the genius of the law of England: insomuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might, and did frequently, escape punishment; for by the rule of the civil law no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was accordingly always a great offence to the English nation; and therefore, in the eighth year of Henry the sixth, it was endeavoured to apply a remedy in parliament; which, however, then miscarried for want of the royal assent.] But afterwards, by 28 Hen. VIII. c. 15, it was enacted, that all treasons, felonies, robberies, murders, and confederacies on the sea, or within the jurisdiction of the admiralty, should be tried, not as previously before the judge of the admiralty, according to the course of the civil law, but by commissioners under the Great Seal; viz. the admiral, or his deputy, and three or four more, (among whom two common law judges were usually appointed;) and that the indictment being first found by a grand jury of twelve men, should be afterwards tried by a petty jury;

and that the course of proceedings should be according to the law of the land (*x*). Again, by 4 & 5 Will. IV. c. 36 —which first established the "Central Criminal Court," for offences committed in the metropolis and certain parts adjoining (*y*),—the judge of the admiralty was placed, (together with the lord mayor of London, the common law judges, and others,) among the judges of the new court: and it was provided, that under any commission of oyer and terminer and gaol delivery, to be issued under the authority of that Act,—such judges (or any two or more of them) might hear and determine any offences committed or alleged to be committed on the high seas, and other places within the jurisdiction of the admiralty; and might deliver the gaol of the court, of any person detained therein for any such offence (*z*). Also by the 7 & 8 Vict. c. 2 (*a*), reciting that it was expedient that provision should be made for the trial of persons charged with offences committed at sea, or within the admiralty jurisdiction, without the issue of any *special* commission for that purpose as required by 28 Hen. VIII. c. 15,—it was enacted, that any justices of assize, oyer and terminer, or gaol delivery, might inquire of and determine all offences committed within the jurisdiction of the admiralty; and that all indictments, trials and other proceedings before them in such cases, should be valid (*b*). And, again, in each of the Consolidation Acts of 24 & 25 Victoria, cc. 96, 97, 98, 99, 100, there is contained a clause to the effect that all indictable offences mentioned in those Acts respectively (which, it will be remembered, comprise larceny, malicious injuries to property, forgery, coinage offences,

(*x*) 4 Bl. Com. p. 269. See also 39 Geo. 3, c. 37, and 46 Geo. 3, c. 54.

(*y*) As to this court, vide post, p. 310.

(*z*) 4 & 5 Will. 4, c. 36, s. 22.

(*a*) As to this provision, see R. *v.* Serva, 2 C. & R. 53; R. *v.* Jones, ib. 165. As to warrants against persons charged with offences committed within the Admiralty jurisdiction, see 11 & 12 Vict. c. 42, s. 8.

(*b*) See also 11 & 12 Vict. c. 42, and the Queen *v.* Eyre, Law Rep., 3 Q. B. 487.

and offences against the person), if committed within the jurisdiction of the admiralty of England or Ireland,—shall be deemed to be offences of the same nature, and liable to the same punishment, as if they had been committed upon land in England or Ireland: and may be dealt with and tried in any place in which the offender shall be apprehended or be in custody (*c*). So that, upon the whole, the jurisdiction of the Court of Admiralty itself to try in England offences committed at sea, or out of the body of some English county (which was once indispensable from the inability of the ordinary courts to try offences so committed), seems now to have been rendered almost or altogether unnecessary.

In connection with the subject under discussion, notice may be here taken of a recent statute, 41 & 42 Vict. c. 73 (the Territorial Waters Jurisdiction Act, 1878), which declares that an offence committed by a person, whether her Majesty's subject or not, on the open sea within the "territorial waters" of her Majesty's dominions (that is to say, any part of the open sea within one marine league of the coast, measured from low water-mark), is an offence within the jurisdiction of the admiral (*d*), although committed on board or by means *of a foreign ship;* and the offender may be arrested, tried and punished accordingly. But the Act contains a proviso that no proceedings shall be instituted against one who is not a subject of her Majesty, except with the consent of a secretary of state, and on his certificate that in his opinion the institution of such proceedings is expedient.

The jurisdiction of the courts hitherto mentioned ex-

(*c*) See 24 & 25 Vict. c. 94, s. 9; c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; and c. 100, s. 68. As to persons charged in any *colony* with offences committed on the seas, see 12 & 13 Vict. c. 96; 18 & 19 Vict. c. 91, s. 21.

(*d*) This expression is made by the Act, for the purposes thereof, an equivalent for the "jurisdiction of the admiralty of England and Ireland," as used in previous statutes. (41 & 42 Vict. c. 73, s. 7.)

tends over crimes that arise, or which may be tried, throughout the whole of England. The jurisdiction of those which follow is local, and confined to particular districts. Of which species are,—

4. The Courts of *Oyer and Terminer* and *General Gaol Delivery* (*e*) (usually called the assizes); which are held at certain intervals throughout the year, and at the least twice in the year in and for every county of the kingdom (*f*); with an exception, to be presently stated, as to the metropolis and parts of the adjacent counties. [These courts were mentioned in the preceding Book: and we then observed, that at the assizes the judges sit, as royal commissioners, by virtue of four several authorities; viz., the commission of the peace, the commission of oyer and terminer, the commission of general gaol delivery, and the commission of *nisi prius;* one of which, (that of *nisi prius,*) being principally of a civil nature, was then explained at large (*g*). The autho-

(*e*) See 4 Inst. 152, 168; 2 Hale, P. C. 22, 32; Hawk. P. C. b. 2, c. 5, s. 6; 4 Bl. Com. 269.

(*f*) Until of late, there were (as a rule) two deliveries only of prisoners at the assizes in the course of the year—one in the spring, the other late in the summer. But this being thought inconvenient, a practice arose of issuing also commissions in the autumn or winter months to try, in certain of the assize towns, prisoners awaiting their trial, with a view to their more speedy deliverance. This was known as the *winter* circuit; but the whole subject has now been re-arranged by the 39 & 40 Vict. c. 57; the 40 & 41 Vict. c. 46; and the 42 & 43 Vict. c. 1;—the general effect being that counties may now be united for the purpose of trying prisoners awaiting their trial either at the "winter" or at the "spring" assizes: that is to say, at those held in that part of the year which includes September, October, November, December, and the January following; and at those held in the period which includes March, April, and May. But nothing in the above Acts "is to "affect the custom of holding sepa- "rate assizes in and for each county "twice a year." (42 & 43 Vict. c. 1, s. 3.)

(*g*) By 36 & 37 Vict. c. 66 (The Judicature Act, 1873), s. 29, her Majesty, either by commission of assize *or any other commission*, either general or special, may assign to any judge of the High Court of Justice, or "other persons usually named in commissions of assize," the exercise of any civil or *criminal* jurisdiction capable of being exercised by such High Court.

[rity by the commission of the peace has also been treated of, when we inquired into the nature and office of a justice of the peace (*h*); and in addition to what was there stated we may here remark, that all justices of the peace of any county, wherein the assizes are held, are bound by law to attend them, upon due notice given by the sheriff (*i*): or else are liable to a fine: in order to return recognizances, &c.: and to assist the commissioners in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned by way of previous examination. But the commission of *oyer and terminer* gives the judges authority to hear and determine all treasons, felonies and misdemeanors committed within the county (*k*). This is directed to the judges and several others, or any two of them (*l*); but only the judges, or serjeants at law, the queen's counsel, and barristers with a patent of precedence, named in the commissions, are of the *quorum;* so that the rest cannot act without the presence of one of them (*m*). Under the commission of *oyer and terminer*, persons may be tried whether they are in gaol or at large (*n*); but the words are to "inquire, hear, and determine:" so that by virtue of this commission, the judges can only proceed upon an indictment found at the same assizes; for they must first inquire, by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury (*o*). Therefore they have besides a commission of general *gaol delivery:* which empowers them to try, and deliver every prisoner who shall be in the gaol when they arrive at the circuit town (*p*); whenever or before whomsoever indicted, or

(*h*) Vide sup. vol. II. pp. 643—652.

(*i*) Cro. Cir. c. 3.

(*k*) 4 Bl. Com. p. 270.

(*l*) In Middlesex the commission is directed to any *four* of them. (4 Chit. Crim. Law, 145; 1 Saund. 249 (*a*).)

(*m*) As to the forms of the commissions and of the writs by which they are accompanied, see 4 Chit. Crim. Law, 129, &c.

(*n*) 1 Chit. Crim. Law, 144.

(*o*) Hawk. P. C. b. 2, c. 5, s. 31.

(*p*) That is, either in actual custody or out on bail, and so in gaol

[for whatever crime committed (*r*). It was antiently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo* (*s*); but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead.] So that, one way or other, the gaols are in general cleared, and all prisoners tried, punished, or delivered, at each assizes, and at convenient intervals throughout the year,—a constitution of singular use and excellence. [Sometimes, also, upon urgent occasions, the sovereign issues a special or extraordinary commission of oyer and terminer and gaol delivery, confined to those offences which stand in need of immediate inquiry and punishment; upon which the course of proceeding is much the same as upon general and ordinary commissions.]

What has been stated applies to courts of oyer and terminer and gaol delivery throughout the realm at large; but for the metropolis and adjacent parts, a different constitution is provided (*t*). For by 4 & 5 Will. IV. c. 36, a new court was established for trial of offences committed in London, Middlesex, and certain suburban parts of Essex, Kent, and Surrey (*u*);—called *the Central Criminal Court* (*x*); the judges or commissioners whereof in-

by construction of law. (1 Chit. Crim. Law, 146.)

(*r*) 2 Hale, P. C. 32, 34.

(*s*) 2 Inst. 43.

(*t*) The Winter Assizes Acts, however, (vide sup. p. 308, n.), extend *mutatis mutandis* to the Central Criminal Court District.

(*u*) Indictments found at the different sessions of the peace, held within the jurisdiction of the Central Criminal Court, may be removed to that court by *certiorari* (4 & 5 Will. 4, c. 36, s. 16). In this court also, offences committed out of its jurisdiction may nevertheless be tried by order of the Queen's Bench division of the High Court of Justice, under the provisions of 19 & 20 Vict. c. 16, and 25 & 26 Vict. c. 65.

(*x*) Before the establishment of the Central Criminal Court, there existed "the court of the Sessions house in the Old Bailey," where the sessions of oyer and terminer and general gaol delivery for the city of London and the county of Middlesex, were holden eight times in the year. It may be remarked, that by 4 & 5 Will. 4, c. 36, s. 13, it was required that no indictment should be presented before the grand jury of the Central Cri-

clude the lord mayor of London; the Lord Chancellor; the judges of the High Court of Justice; the aldermen, recorder and common serjeant of London; the judge of the city of London court; any person who has been Lord Chancellor, or a judge of the High Court; and such others as the Crown shall from time to time appoint (*y*). And it is provided that the Crown may issue its commission of oyer and terminer and gaol delivery to such court (*z*); and that the said judges, or any two or more of them (*a*), shall hold a session in the city of London or suburbs thereof, at least twelve times in every year (and oftener if need be),—such times to be fixed by General Orders of the said court; which Orders any eight or more of the judges of the High Court of Justice are empowered from time to time to make (*b*).

5. The Court of *General Quarter Sessions* of the peace, to which some reference was made in a preceding volume while considering the duties of the justices of the peace (*c*), is a court that must be held, in each county, once in every quarter of a year (*d*): and by statute 11 Geo. IV.

minal Court, unless the party prosecuting first entered into recognizances to prosecute, but this enactment was repealed by 9 & 10 Vict. c. 24, s. 2. By 19 & 20 Vict. c. 16, ss. 22, 23, however, the court is enabled, in cases ordered by the High Court of Justice to be there tried, to require (if it see fit) either the person charged, or the prosecutor and witnesses, to enter into recognizances.

(*y*) 4 & 5 Will. 4, c. 36, s. 1. Among the persons named in the text, those who usually sit to try prisoners in the Central Criminal Court, are certain of the judges of the High Court of Justice, the recorder, the common serjeant, and the judge of the City of London Court.

(*z*) Sect. 2. See 36 & 37 Vict. c. 66 (The Judicature Act, 1873), s. 76.

(*a*) As to the effect of these words, see Leverson *v.* The Queen, Law Rep., 4 Q. B. 394.

(*b*) 4 & 5 Will. 4, c. 36, s. 15.

(*c*) Vide sup. vol. II. p. 650.

(*d*) 4 Inst. 170; 2 Hale, P. C. 42; Hawk. P. C. b. 2, c. 8. As to the origin of this court, see Harding *v.* Pollock, 6 Bing. 30. This court is called "the general quarter sessions of the peace," when held quarterly; when held otherwise, "the general sessions of the peace." (See R. *v.* Justices of Carmarthen, 4 B. & Ald. 291.)

& 1 Will. IV. c. 70, s. 35, the quarter sessions are appointed to be held in the first week after the 11th day of October; the first week after the 28th day of December; the first week after the 31st day of March; and the first week after the 24th day of June (*e*). [This court is held before two or more justices of the peace (*f*); one of whom must be of the *quorum* (*g*). Its jurisdiction, by statute 34 Edw. III. c. 1, extended in general to the trying and determining of all felonies and trespasses whatsoever, committed within the county; but it was never usual to try in this court any greater offences than small felonies; their commission providing that if any case of difficulty arose, the justices of the peace should not proceed to judgment, but in the presence of one of the justices of the Queen's Bench or Common Pleas, or of one of the judges of assize; and therefore murders, and other capital felonies, were usually remitted for a more solemn trial at the assizes (*h*).] And now it is expressly provided,

(*e*) By 4 & 5 Will. 4, c. 47, however, after reciting that in some counties of England and Wales the time usually fixed for holding spring assizes interferes with the due holding of the quarter sessions, in the first week after the 31st of March; and that though the justices have authority to hold general sessions of the peace at other times of the year, besides those specified in 11 Geo. 4 & 1 Will. 4, c. 70, such sessions are not *quarter sessions* within the intent of various Acts of Parliament, which give jurisdiction to the justices of the peace in their quarter sessions, or in their general quarter sessions,—it is enacted, that to prevent the interference of the spring assizes with the April quarter sessions, the justices of the Epiphany sessions may, (if they see occasion,) name two of their body to fix some day for holding the next general quarter sessions, not earlier than 7th of March, nor later than 22nd of April.

(*f*) As to justices of the peace generally, vide sup. vol. II. pp. 643—652.

(*g*) As to the powers of the justices, to divide themselves into several courts of sessions of the peace for despatch of business, see 7 Will. 4 & 1 Vict. c. 19, s. 4; 14 & 15 Vict. c. 55, s. 15; 21 & 22 Vict. c. 73, ss. 9—11. See also 1 & 2 Vict. c. 4, to remove doubts as to the legality of summoning juries for the trial of prisoners at *adjourned* quarter sessions.

(*h*) The court of quarter sessions is enabled to reserve any question of law for the consideration of the judges of the High Court of Jus-

by statute, that the justices of a county shall not, at general or quarter sessions, try any prisoner for treason, murder or capital felony; nor for any felony, which when committed by a person not previously convicted of felony, is punishable with penal servitude for life (*i*); nor for any of the particular offences enumerated in 5 & 6 Vict. c. 38 (*k*). They are also restrained from trying persons charged with fraudulent practices, as *agents*, *trustees*, *bankers*, or *factors* under the Larceny Act of 1861 (*l*). [Neither can they try any newly-created offence, without express power given them by the statute which creates it (*m*). But there are many offences and particular matters, which by particular statutes belong properly to this

tice. (See 11 & 12 Vict. c. 78; 36 & 37 Vict. c. 66, s. 47; 37 & 38 Vict. c. 83, s. 19.)

(*i*) See 4 & 5 Vict. c. 56, s. 6; 5 & 6 Vict. c. 38; 20 & 21 Vict. c. 3.

(*k*) These are,—1. Misprision of treason. 2. Offences against the queen's title, prerogative or government, or against either house of parliament. 3. Offences subject to the penalties of *præmunire*. 4. Blasphemy and offences against religion. 5. Administering or taking unlawful oaths. 6. Perjury and subornation of perjury. 7. Making or suborning false oaths, &c., punishable as perjuries or misdemeanors. 8. Forgery. 9. Maliciously firing corn, grain, &c., wood, trees, &c., or heath, gorse, &c. 10. Bigamy, and offences against the laws relating to marriage. 11. Abduction of women and girls. 12. Concealing births. 13. Seditious, blasphemous, or defamatory libels. 14. Bribery. 15. Unlawful combinations and conspiracies, with certain exceptions. 16. Stealing, &c. records, &c. 17. Stealing, &c. bills, &c., and written documents relating to real estate. The Act also included offences against the bankrupt laws, but by the express provision of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 20), these may now be tried at the quarter sessions.

Courts of general or quarter sessions are also restrained, by 9 Geo. 4, c. 69, from trying the offence of three or more persons pursuing game by night. They were also prohibited by 9 & 10 Vict. c. 25, from trying any of the offences (chiefly falling under the class of malicious injuries to property) made punishable by that Act. It may, however, be noticed, that the 9 & 10 Vict. c. 25 is repealed by 24 & 25 Vict. c. 95, and that no prohibitory clause to the same effect is inserted in the 24 & 25 Vict. c. 97, the Malicious Injuries to Property Act, 1861.

(*l*) 24 & 25 Vict. c. 96, s. 87.

(*m*) R. *v.* Buggs, 4 Mod. 379; Salk. 406.

[jurisdiction, and ought to be prosecuted in this court,—as the smaller misdemeanors and felonies; and especially offences relating to the game, highways, ale houses, bastard children, the settlement and provision for the poor, servants' wages, and apprentices (*n*).] Some of these are proceeded upon by indictment; others by way of *appeal* from the orders or convictions of justices out of sessions; and others in a summary way by motion and order thereupon. An order of the court of quarter sessions may, as the general rule, unless prevented by the provisions of some particular statute, be removed into the Queen's Bench division of the High Court of Justice by writ of *certiorari facias* (*o*); and be there either quashed or confirmed (*p*). But the removal of an *indictment* found at sessions can (as we have seen) now only take place under certain circumstances (*q*). [The records or rolls of the sessions, are committed to the custody of a special officer, denominated the *custos rotulorum;* who is always a justice of the quorum, and, "among them of the quorum," saith Lambard, "a man for the most part especially picked out either for wisdom, countenance or credit" (*r*). The nomination of the *custos rotulorum* is by the royal sign manual; and to him the nomination of the *clerk of the peace* of the county belongs,—an officer who (among other duties) acts as clerk to the court of quarter sessions, and records all their proceedings (*s*).]

(*n*) See Lamb. Eirenarcha, and Burn's Justice.

(*o*) Hawk. P. C. b. 2, c. 27, ss. 22, 23.

(*p*) See R. *v.* Joseph, 1 W. W. & H. 419; R. *v.* Joule, 5 A. & E. 539; R. *v.* Higgins, ib. 554. As to the removal of the orders of quarter sessions into the Queen's Bench division, to be there enforced, see 12 & 13 Vict. c. 45, s. 18; Hawker *v.* Field, 1 L. M. & P. 606.

(*q*) Vide sup. p. 301.

(*r*) B. 4, c. 3.

(*s*) 37 Hen. 8, c. 1; 1 W. & M. c. 21; Harding *v.* Pollock, 6 Bing. 25. As to the suspension or dismissal of the *clerk of the peace*, see 1 W. & M. c. 21, s. 6; 27 & 28 Vict. c. 65; The Queen *v.* Hayward, 2 B. & Smith, 585; Wilde *v.* Russell, Law Rep., 1 C. P. 722. He is to take the custody of such documents as are directed to be deposited with him, under the stand-

As regards the county of Middlesex in particular,—it was enacted, by 7 & 8 Vict. c. 71, (amended by 22 & 23 Vict. c. 4,) that there shall be holden for that county two sessions, or adjourned sessions, of the peace in every calendar month; and that the first sessions in January, April, July and October, respectively, shall be the general quarter sessions of the county (*t*); and that the second sessions in January, April, July and October, shall be adjournments of the general quarter sessions. It was also provided therein, that it shall be lawful for her majesty to appoint a person,—being a serjeant, or a barrister at law of not less than ten years' standing, and in the commission of the peace for the county, and qualified by law to act as justice of the peace,—to be the Assistant Judge of the said court of sessions of the peace; who shall preside at the hearing of all appeals, on the trials of all felonies and misdemeanors, and all matters connected therewith; and who shall hold his office during good behaviour (*u*).

In many corporate towns or boroughs, there is also a

ing orders of either house of parliament. (7 Will. 4 & 1 Vict. c. 83; see R. *v.* Payn, 6 A. & E. 392.) As to his remuneration (which used to be by fees, but may now, at the discretion of the justices, be by salary), see 14 & 15 Vict. c. 55, s. 9; and see also 18 & 19 Vict. c. 126, s. 18. As to conveyances of land, &c. to the clerk of the peace or treasurer of the county, see 21 & 22 Vict. c. 92. As to the clerk of the peace for the County Palatine of Lancaster, see 34 & 35 Vict. c. 73.

(*t*) It is enacted by 22 & 23 Vict. c. 4, s. 4, that every general sessions for Middlesex shall have the powers, &c. of a general *quarter* sessions of that county.

(*u*) In cases of sickness or unavoidable absence, or such occasion as shall be allowed by a secretary of state, the assistant judge may appoint from time to time a deputy. (7 & 8 Vict. c. 71, s. 8.) By 14 & 15 Vict. c. 55, s. 14, the qualification for such deputy is, that he shall be of ten years' standing at the bar; but he need not be in the commission of the peace for the county, as was formerly required under 7 & 8 Vict. c. 71. By 22 & 23 Vict. c. 4, provisions are also made for the appointment of a temporary assistant judge in case of need. See also 37 & 38 Vict. c. 7, as to the payment of the assistant judge and his deputy and the chairman of the second court.

court of quarter sessions of the peace; having, in general, the same jurisdiction in the trial of offences and other matters arising within the limits of the borough, as the county quarter sessions within the county (*x*). Of such court, the recorder of the borough is, by 5 & 6 Will. IV. c. 76, s. 105, constituted the judge: and he is, by that statute, directed to hold the court once in every quarter of a year; or at such other and more frequent times as in his discretion he may think fit, or her majesty may direct (*y*).

6. The court of the *coroner* is a court of record to inquire when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. But of the coroner and his office we treated at large in a former volume, among the public officers of the kingdom, and therefore shall not here repeat our inquiries (*z*); only mentioning his court by way of regularity among the criminal courts of the nation (*a*).

With regard to most of the other courts we are about to speak of, it is to be understood that though proper to be enumerated in their place among the criminal courts, and interesting as traces of a state of things long since passed away, they are for the most part fallen into disrepute, and indeed may be said, though not expressly abolished, to have become practically obsolete. Of this class was,—

7. [The *Sheriff's Tourn* or *rotation*, which was a court of record appointed to be held twice every year, within a

(*x*) 5 & 6 Will. 4, c. 76, ss. 103, 105, 118. It is to be observed, that all the restrictions expressed by statute, with regard to the trial of certain offences at general or quarter sessions, mentioned sup. p. 313, in reference to the quarter sessions for the *county*, equally apply to the borough quarter sessions.

(*y*) As to the division of such courts for the better despatch of business, and the appointment and remuneration of the necessary officers and of an assistant barrister as judge, see 7 Will. 4 & 1 Vict. c. 19, and 40 & 41 Vict. c. 17.

(*z*) Vide sup. vol. II. p. 639.

(*a*) 4 Inst. 271; 2 Hale, P. C. 53; Hawk, P. C. b. 2, c. 9.

[month after Easter and Michaelmas, before the sheriff in different parts of the county (*b*): being indeed only the *turn* of the sheriff to keep a court leet, in each respective hundred (*c*). This therefore was the great court leet of the county, and out of it, for the ease of the sheriff, was taken,—

8. The *Court Leet*, or *View of Frank Pledge* (*d*); which, also, was a court of record, appointed to be held once in the year and not oftener, within a particular hundred, lordship, or manor, before the steward of the leet (*e*): being the king's court granted by charter to the lords of those hundreds or manors. Its original intent was to view the frank pledges, that is, the freemen within the liberty; who, we may remember, according to the institution of the great Alfred, were all mutually pledges for the good behaviour of each other (*f*). Besides this, the preservation of the peace, and the chastisement of divers minute offences against the public good, were the objects both of the court leet, and of the sheriff's tourn: which had exactly the same jurisdiction, one being only a larger species of the other: extending over more territory, but not over more causes. All freeholders within the precinct were obliged to attend them, and all persons commorant therein: which commorancy consisted in usually lying there: a regulation which owes its original to the laws of king Canute (*g*). But persons under twelve and above sixty years old; peers; clergymen; women; and the king's tenants in antient demesne,—were always excused from attendance there: all others being bound to appear upon the jury, (if required,) and make their due presentments. It was also antiently the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to come to the court leet, and there take the oath of allegiance to the king. The other

(*b*) 4 Inst. 259; 2 Hale, P. C. 69; Hawk. P. C. b. 2, c. 10.
(*c*) Mirr. c. 1, ss. 13, 16.
(*d*) 4 Inst. 261; Hawk. P. C. b. 2, c. 11.
(*e*) Mirr. c. 1, s. 10.
(*f*) Vide sup. vol. I. p. 122.
(*g*) Part 2, c. 19.

[general business of the leet and tourn, was to present by jury all crimes whatsoever that happened within their jurisdiction: and not only to present, but also to punish, all trivial misdemeanors;—as all trivial debts were recoverable in the court baron and sheriff's county court:—justice, in these minuter matters of both kinds, being brought home to the doors of every man by our antient constitution (*g*). The objects of their jurisdiction were therefore unavoidably very numerous; being such as in some degree, either less or more, affected the public weal, or good government of the district in which they arose; from common nuisances and other material offences against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet fell by degrees into a declining way (*h*): a circumstance owing, in part, to the discharge granted by the statute of Marlborough, (52 Hen. III. c. 10,) to all prelates, peers, and clergymen, from their attendance upon these courts; which occasioned them to grow into disrepute. And hence their business, for the most part, gradually devolved upon the quarter sessions; which indeed it was particularly directed to do, in some cases, by stat. 1 Edw. IV. c. 2. It also, in some instances, devolved upon the justices out of sessions. And now (as already intimated) both tourn and leet have fallen, in most parts of the kingdom, into total disuetude (*i*).

9. The Court of the *Clerk of the Market*, is properly incident to every fair and market in the kingdom, to punish misdemeanors therein (*k*);—as a court of *pied poudre* is to determine all disputes therein, relating to pri-

(*g*) Blackstone (vol. iv. p. 274) observes, that, in the Gothic constitution, the *hæreda*, which answered to our court leet, "*de omnibus quidem cognoscit, non tamen de omnibus judicat;*" and he cites Stiern. de Jure Goth. l. 1, c. 2.

(*h*) This was so, even in the time of Blackstone (vide ubi sup.); and see Colebrook *v.* Elliott, 3 Burr. 1864.

(*i*) In some places, however, a "court leet" is still periodically held before the steward, but only for the transaction of the administrative business of the manor.

(*k*) 4 Inst. 273.

[vate or civil property. The object of this jurisdiction was principally the recognizance of weights and measures; to try whether they be according to the true standard thereof or no. Which standard was antiently committed to the custody of the *bishop*, who appointed some clerk under him to inspect the abuse of them more narrowly: and hence this officer, though usually a layman, was called the *clerk* of the market (*l*). If they were not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves were directed to be burnt.] This is the most inferior court of criminal jurisdiction in the kingdom: but its functions, as regards weights and measures, seem superseded by the modern provisions with regard to this subject, of which we gave some account in a former volume (*m*); and to what we there said we shall only add in this place that any offences under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), may be prosecuted and all fines and forfeitures recovered before a court of summary jurisdiction, with an appeal, however, to the next practicable court of general or quarter sessions (*n*).

10. [There are also some criminal courts of a confined and partial jurisdiction: extending indeed only to particular places, which the royal favour, confirmed by Act of Parliament, distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemeanors arising within the bounds of their cognizance. We shall only here refer to two of these tribunals.

The first of these, the Court of the *Lord Steward* of the King's *Household*, or, in his absence, of the treasurer, comptroller, and steward of the *marshalsea*, was created by statute 33 Hen. VIII. c. 12, with a jurisdiction to inquire of, hear, and determine "all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious strikings,"

(*l*) Bac. of English Government, b. 10, c. 8.

(*m*) Vide sup. vol. II. p. 520.

(*n*) 41 & 42 Vict. c. 49, ss. 56, 60.

[whereby blood should be shed in or within the limits (that is, within two hundred feet of the gate) of any of the palaces or houses of the king, or any other house where the royal person should abide. The proceedings were by jury, both a grand and petty one, as at common law; taken out of the officers and sworn servants of the king's household: and the form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand,—which is part of the punishment for shedding blood in the king's court,—are very minutely set forth in the said statute: where the several offices of the servants of the household in and about such execution are also described; from the serjeant of the woodyard, who furnished the chopping-block, to the serjeant farrier, who was to bring hot irons to sear the stump.] But so much of the above Act "as relates to the punishment of "manslaughter and malicious striking, by reason whereof "blood shall be shed," was expressly repealed by 9 Geo. IV. c. 31; and the jurisdiction of the court itself has long since fallen into complete disuse.

Lastly, we will mention the courts of the universities of Oxford and Cambridge, which have a criminal as well as a civil jurisdiction, and this of an extensive kind. The chancellor's court, indeed, hath authority to determine all offences which are misdemeanors only, when committed by a member of the university; and even treason, felony and mayhem, if found to have been committed by any member thereof, may be tried in the court of the *Lord High Steward* of the university (*p*).

[So far as Oxford is concerned this jurisdiction rests on a charter of the 7th June, in the second year of Henry the

(*p*) Blackstone (vol. iv. p. 277) treats only of the criminal jurisdiction of the University of *Oxford*. A similar jurisdiction is, however, enjoyed by that of Cambridge. (See Bac. Ab. tit. "Universities.") As to the jurisdiction exercised by the proctors over persons *not* members of the university, in order to protect the morals of the students, see Kemp *v.* Neville, 10 C. B., N. S. 523.

[fourth (confirmed by statute 13 Eliz. c. 29); and by this charter cognizance is granted to that university of all indictments of treasons, insurrections, felonies and mayhem, which shall be found in any of the royal courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy; who is to be nominated by the chancellor of the university for the time being. But, when his office is called forth into action, such high steward must be approved by the lord high chancellor of England; and a special commission, under the Great Seal, is given to him and others, to try the indictment then depending, according to the law of the land, and the privileges of the university. When, therefore, an indictment is found at the assizes or elsewhere, against any scholar of the university or other privileged person, the vice-chancellor may claim the cognizance of it (*k*); and, (when claimed in due time and manner,) it ought to be allowed him by the judges of assize; and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the cognizance claimed; for it is apprehended that the high steward cannot proceed originally *ad inquirendum:* but only, after inquest in the common law courts, *ad audiendum et terminandum.* Much in the same way as when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assizes or in the Queen's Bench: and then, in consequence of a writ of *certiorari*, transmitted to be finally heard and determined, before his grace the lord high steward and the peers.

When the cognizance is so allowed,—if the offence be

(*k*) See R. *v.* Agar, 5 Burr. 2820; Kendrick *v.* Kynaston, 1 Bla. Rep. 454; Hayes *v.* Long, 2 Wils. 310; Leasingby *v.* Smith, ib. 406; R. *v.* Routledge, 2 Doug. 531; R. *v.* Grundon, Cowp. 319; Thornton *v.* Ford, 15 Exch. 634. The statute 19 & 20 Vict. c. xvii, s. 18, takes away all right of the University of *Cambridge* to claim cognizance in any proceedings (criminal or otherwise) to which any person, *not* a member of the university, is party.

[*inter minora crimina*, or a misdemeanor only, it is tried before the ordinary judge of the chancellor's court. But if it be for treason, felony or mayhem, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this: The high steward issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedells of the university, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio universitatis gaudentes.*" And by a jury formed *de medietate*,—half of freeholders and half of matriculated persons,—is the indictment to be tried: and that in the Guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty of a capital offence, the sheriff of the county must execute the university process: to which he is annually bound by an oath.

These proceedings have been described with some minuteness, on account of the importance of the privilege; but in modern times the occasions for reducing them into practice have been happily very rare; nor will it perhaps ever be thought advisable to revive them, though it is not a right that rests merely *in scriptis*, or theory, but has formerly been carried into execution. There are several instances,—one in the reign of Queen Elizabeth, two in that of James the first, and two in that of Charles the first, where indictments for murder have been challenged by the vice-chancellor at the assizes, and afterwards tried before the high steward, by jury. The commissions under the Great Seal, the sheriff's and bedell's panels, and all the other proceedings on the trial of the several indictments,—are still extant in the archives of the university (*l*).]

(*l*) As to the university courts, see also sup. bk. v. c. IV., and 25 & 26 Vict. c. 26, s. 12.

CHAPTER XI.

OF PROCEEDINGS OF A SUMMARY NATURE, AND HEREIN OF SUMMARY CONVICTIONS AND ATTACHMENT.

[We are next, according to the plan we laid down, to take into consideration the proceedings which obtain in the several courts of criminal jurisdiction, in order to the punishment of offences (*a*). These proceedings are divisible into two kinds, *summary* and *regular:* the former of which shall be briefly explained, before we enter on the latter, which will require a more thorough and particular examination.

By a *summary* proceeding, is meant principally such as is directed by several Acts of Parliament, (for the common law is a stranger to it, unless in the case of contempts,) for the conviction of offenders, and the infliction of certain penalties created by those Acts. In a summary proceeding, there is no intervention of a jury; but the party accused is acquitted or condemned, according to the opinion of such person or persons, as the statute has appointed for his judge. An institution designed professedly for the greater ease of the subject; by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offence.

I. Of this summary nature are trials of frauds against, or breaches of, the laws of the *excise* and other branches of the revenue (*b*), many of which offences may be inquired into and determined either by the *commissioners of revenue* (*c*), or in the country before *justices of the peace.*]

(*a*) Vide sup. p. 292.

(*b*) As to the *excise, stamps, taxes, customs,* &c., vide sup. bk. IV. pt. I.

c. VII.

(*c*) By 43 Geo. 3, c. 99, s. 33, a person commanded by the com-

And the Summary Jurisdiction Acts (presently to be noticed) are to apply to all informations, complaints, and other proceedings taken before "a court of summary jurisdiction,"—that is to say, a justice or justices to whom jurisdiction is given, or who is or are authorized to act under those Acts when sitting in open court,—under the Post Office, Inland Revenue, or Customs Acts (*d*); and in such cases, where the penalty exceeds 50*l*., the period of imprisonment in respect of non-payment, or in default of a sufficient distress, may exceed three months, but shall not exceed six months (*e*).

II. Another branch of summary proceedings, is that which takes place before justices of the peace in the exercise of their ordinary jurisdiction, in respect of a variety of minor offences: viz. such as are visited only with pecuniary penalties (*f*). Some of these were formerly punishable at the court leet, while that court was still in use; but the greater part have been both created and placed under the summary jurisdiction of the justices, by the provisions of modern Acts of Parliament, and are dealt with by them in accordance with what are known as the "Summary Jurisdiction Acts" (*g*). But besides these minor offences, there are others of a graver description, which may also now be dealt with by a court of summary jurisdiction: and for which the punishment is in some cases a pecuniary penalty, and in others either a penalty or imprisonment with hard labour for a term of six months; or, in case of a second conviction, twelve months (*h*). Of these, our limits will only permit the

missioners to pay tax duties may, *if there be no sufficient distress on his premises*, be committed to prison without bail or mainprize, till payment be made. And there are other statutory provisions for the protection of the revenue, of an equally stringent character.

(*d*) See 42 & 43 Vict. c. 49, ss. 20, 50.

(*e*) See sects. 20, 50, 53.

(*f*) Vide sup. p. 6.

(*g*) These are the 11 & 12 Vict. c. 43, and the 42 & 43 Vict. c. 49, and "any Act, past or future," amending either of them (42 & 43 Vict. c. 49, s. 50).

(*h*) In some cases of repeated convictions the imprisonment may be even longer.

mention of some of the most important, such as the *abetment* of any offence made punishable by way of summary conviction under the 24 & 25 Vict. cc. 96, 97 (*i*),—the stealing, or killing with intent to steal, any *bird*, *beast* or other domestic or confined animal not the subject of larceny at the common law (*k*),—killing or wounding forest *deer* (*l*),—killing *dogs* or other animals (not being cattle) either the subject of larceny at common law or ordinarily kept confined (*m*),—stealing (or having in possession stolen) *dogs* (*n*),—stealing *fences* (*o*),—taking *fish* (*p*),—killing *hares* or *rabbits* (*q*),—doing certain *malicious injuries* to property (*r*),—*receiving* certain kinds of property knowing it to have been stolen (*s*),—injuring, &c. *electric or magnetic telegraphs* (*t*), and injuring or stealing *trees* (*u*) or *vegetable productions* in gardens (*x*). As to *assaults* or *batteries*, also, the legislature has now made provisions with regard to the summary jurisdiction of justices of a wider character than formerly existed. For, by 24 & 25 Vict. c. 100, s. 42 (*y*), if a person shall unlawfully assault or beat another, two justices of the peace, upon complaint of the party aggrieved, may hear and determine the offence: and may commit the offender to prison, with or without hard labour, for any period not exceeding two months; or else fine him to the extent of 5*l.*, and in default of payment, imprison him to the extent above mentioned. And if the assault or battery be on a male child, whose age, in the opinion of the justices, shall not exceed fourteen years, or be upon a female, the punishment inflicted may be by imprisonment, with or without hard labour, for as long as six months, or by a fine to the extent of

(*i*) See 24 & 25 Vict. c. 96, s. 99; c. 97, s. 63.
(*k*) Ib. c. 96, ss. 21, 22.
(*l*) Sect. 12.
(*m*) Ib. c. 97, s. 41.
(*n*) Ib. c. 96, ss. 18, 19.
(*o*) Sect. 34.
(*p*) Sect. 24. As to catching fish in public fisheries by the use of *explosive substances*, see 40 & 41 Vict. c. 65.
(*q*) 24 & 25 Vict. c. 96, s. 17.
(*r*) Ib. c. 97, s. 52.
(*s*) Ib. c. 96, s. 97.
(*t*) Ib. c. 97, ss. 37, 38.
(*u*) Ib. c. 96, s. 33.
(*x*) Sects. 36, 37.
(*y*) Re-enacting 9 Geo. 4, c. 31, s. 27, repealed by 24 & 25 Vict. c. 95.

20*l.*, (or in default, imprisonment); and the offender may also be bound over to keep the peace for an additional six months (*z*). And the justices are required, in such charges, if on the hearing upon the merits they deem the assault or battery not proved, or justifiable, or too trifling to merit punishment, to give the party charged, in dismissing the complaint, a certificate of dismissal, which will operate as a bar to any further proceedings, civil or criminal (*a*). While on the other hand, if after investigation they shall find that the assault or battery was accompanied by an attempt *to commit any felony*, or are of opinion that the same is, for any other circumstance, a fit subject for an indictment, they are to deal with the case as if they had no authority to determine the same. And there is also a proviso preventing the justices from determining a case in which any question shall arise as to the title to lands, tenements or hereditaments, or as to any interest therein or accruing therefrom (*b*); or as to any bankruptcy, or any execution under the process of a court of justice (*c*).

Moreover, in addition to the jurisdiction already referred to, justices in the exercise of their functions as "a court of summary jurisdiction" are enabled, in certain cases, summarily to dispose even of charges of larceny and other indictable offences; and their powers in this behalf have been largely augmented by the "Summary Jurisdiction Act, 1879,"—the 42 & 43 Vict. c. 49 (*d*). For by this statute,

(*z*) 24 & 25 Vict. c. 100, s. 43.

(*a*) Sects. 44, 45. The same consequences in regard to estopping future proceedings, follow a conviction and the payment of the fine. As to the species of assaults contemplated by the above enactments, see Wilkinson *v.* Dutton, 3 B. & Smith, 821; as to the effect of a conviction or certificate on subsequent proceeding, see Vaughton, app. *v.* Bradshaw, resp., 9 C. B., N. S. 103; Hancock *v.* Somes, 1 E. & E. 795; Costar *v.* Hetherington, ib. 802; The Queen *v.* Ebrington, 1 B. & Smith, 688; Hartle *v.* Hindmarsh, Law Rep., 1 C. P. 553; The Queen *v.* Morris, ib. C. C. R. 90.

(*b*) See The Queen *v.* Pearson, Law Rep., 5 Q. B. 237.

(*c*) 24 & 25 Vict. c. 100, s. 46.

(*d*) By this Act the previous enactments on the subject of larcenies, &c. by juvenile offenders and others contained in 10 & 11 Vict. c. 82, 13 & 14 Vict. c. 37, and 18 & 19 Vict. c. 126, are repealed.

(the provisions of which can only be briefly summarized in this work,) it is, in the first place, provided, that where a *child*—that is to say, a person who, in the opinion of the court of summary jurisdiction before whom he is brought, is under the age of twelve years (*e*)—is charged with any indictable offence other than homicide, such court may, if they think it expedient, and the parent or guardian, when informed by them of his right to have the child tried by a jury, does not object, deal summarily with the offence, and punish it as though it had been tried on indictment,—except that no sentence of penal servitude shall be passed, or imprisonment more than for one month, or fine to a greater amount than forty shillings (*f*); but, on the other hand, when the child is a male, the punishment may consist or be accompanied with a private whipping of not more than six strokes of a birch rod, inflicted by a constable in the presence of a superior officer, and also (if he desires to be present) in the presence of the parent or guardian (*g*).

In the next place, where a *young person* (that is to say, a person who, in the opinion of the court, is between the ages of twelve and sixteen) is charged with simple larceny, any offence declared by statute to be punishable as simple larceny, larceny from the person, larceny or embezzlement as a clerk or servant, the guilty reception of stolen goods (*h*), aiding or procuring the commission of any of the above offences, or attempting to commit them—the court, if they think it expedient, having regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case, and if, on being informed of his right to be tried by a jury, he consents to be dealt with summarily, may so deal with him

(*e*) See 42 & 43 Vict. c. 49, s. 49.

(*f*) Sect. 10. See also sect. 15.

(*g*) Sect. 10. The right to send the child to a reformatory or industrial school is not affected by this provision, nor will it enable a child to be punished, unless, in the opinion of the court, he is above the age of seven years and of sufficient capacity to commit crime. (Ibid.)

(*h*) See sect. 11, First Sched., Column I.; 24 & 25 Vict. c. 96, ss. 91, 95.

accordingly: and if found guilty may either fine him to the extent of ten pounds, or imprison him with or without hard labour to the extent of three months; and (as in the case of a "child") the punishment may consist or be accompanied with whipping inflicted in a similar manner, only that twelve strokes instead of six may be directed to be given (*h*).

And, thirdly, where an *adult* (that is to say, a person who, in the opinion of the court, is of the age of sixteen or upwards) is charged with simple larceny, any offence declared by statute to be punishable as simple larceny, larceny from the person, larceny or embezzlement as a clerk or servant, the guilty reception of stolen goods, aiding or procuring the commission of the above offences, or attempting to commit them—and provided that, in the opinion of the court, the value of the property in respect of which the offence is alleged to have been committed *does not exceed forty shillings*—the court, if they think it expedient under all the circumstances, (as in the case of a "young person,") and if the person charged, on being informed of his right to be tried by a jury, consents to be summarily dealt with, may deal with him summarily accordingly; and if found guilty may adjudge him to be imprisoned with or without hard labour for any term not exceeding three months, or to pay a fine not exceeding twenty pounds.

There is, however, a proviso that if the offence is one which, by reason of a previous conviction on indictment of the person charged, is punishable with penal servitude, the court shall not deal with the case under this Act (*i*). And there is another enactment deserving of notice, viz., that if the court shall think the charge proved, but in the particular case of so trifling a nature that it is inexpedient to inflict any or other than a nominal punishment, it may, without proceeding to conviction, dismiss the

(*h*) 42 & 43 Vict. c. 49, s. 11. (*i*) Sect. 14.

information, and yet may order the person charged to pay damages not exceeding forty shillings and the costs of the proceedings; or, if they proceed to conviction, may discharge him without punishment, and either with or without a condition that he is to come up for sentence when called upon, or to be of good behaviour (*j*).

Some other provisions affecting the powers of a court of summary jurisdiction as regulated by this statute may also be here specified. Thus—1. Where the court has authority under the provisions of any Act to impose either imprisonment or a fine, such imprisonment may be directed to be without hard labour, and the prescribed period thereof or the prescribed amount of the fine reduced; and if the Act prescribes a requirement that the offender enter into recognizances and to find sureties to keep the peace, or other condition, such requirement may be dispensed with; and if the only punishment authorized by the Act be imprisonment, and the court shall think that the justice of the case will be better met by a fine, they may impose a fine not exceeding twenty-five pounds (*k*).

2. Whatever period of imprisonment may be specified in the enactment dealing with the offence, in default of payment of money ordered to be paid, or of a sufficient distress to satisfy the same, the period to which the defendant shall under this Act be sentenced in default, shall be such as in the opinion of the court will satisfy the justice of the case, but shall not exceed the scale fixed therein; and shall be without hard labour except where the enactment on which the conviction is founded authorizes hard labour,—when it may be awarded if the court shall be of opinion that the justice of the case requires it (*l*).

(*j*) 42 & 43 Vict. c. 49, s. 15.

(*k*) Sect. 4.

(*l*) Sect. 5. The scale is seven days when the sum to be paid does not exceed 10*s*., fourteen days between 10*s*. and 20*s*., one month between 20*s*. and 100*s*., two months between 5*l*. and 20*l*., three months over 20*l*. (Ib.)

3. Where any person is adjudged to be imprisoned without the option of a fine, he may, as the general rule, appeal to a court of general or quarter sessions; but this does not apply where the imprisonment is for failing to comply with an order to pay money, find sureties, enter into recognizances, or give security (*n*).

4. No case shall be heard, tried, determined, or adjudged by a court of summary jurisdiction, except when sitting in *open court;* that is to say, either in some police station or other occasional court house, or in some place wherein justices are accustomed to assemble for holding special or petty sessions, or which is appointed as a temporary substitute for such place—such place being in the Act described as a "petty sessional court house"(*o*).

5. The Lord Mayor of London, and any alderman thereof, and any metropolitan or borough police, or any other stipendiary magistrate, when sitting in open court shall be deemed to be a court of summary jurisdiction sitting as a petty sessional court (*p*).

The course of proceeding before a court of summary jurisdiction in general is regulated by the statute 11 & 12 Vict. c. 43 (*p*); which consolidated and amended the previous provisions on the subject (*q*). Its effect may be shortly stated as follows:—

Where a written *information* has been laid before any

(*n*) 42 & 43 Vict. c. 49, s. 19.

(*o*) Sect. 20.

(*p*) The statute 11 & 12 Vict. c. 43, states that it is not to affect any of the provisions in the Metropolitan or London Police Acts. But as to this, see the proviso contained in 42 & 43 Vict. c. 49, s. 54.

(*q*) In the time of Blackstone, the course of proceeding before magistrates had begun to take a regular shape, but seems to have been attended at a prior period with but little ceremony. For he says (vol. iv. p. 283), "The summons is now held to be an indispensable requisite, though the justices long struggled the point, forgetting that rule of natural reason expressed by Seneca:—

'*Qui statuit aliquid, parte inauditâ alterâ,*
Æquum licet statuerit, haud æquus fuit.'"

justice of the peace for any county or place in England or Wales, of any offence committed within his jurisdiction, and made punishable on summary conviction,—he is to issue his *summons* to the party charged, requiring him to appear and answer the charge (*r*): and, if the summons be disobeyed, he may then issue a *warrant* to apprehend him, and bring him before the court: or, if the justice think fit, he may,—if the information be supported by the oath of the prosecutor (*s*),—cause a warrant instead of a summons to be issued in the first instance (*t*). By the general rule, however, and subject to exception in any particular case where a different limitation as to time is provided by Act of Parliament, every such information must be laid within six calendar months from the time when the matter arose (*u*).

A summons may also be issued by the justice to compel the attendance of witnesses for the prosecutor or defendant, as the case may be; and if the summons be disobeyed, the justice may issue his warrant for the same purpose; or, if satisfied by evidence upon oath that the witness will not attend, may issue such warrant in the first instance (*x*).

The hearing is to take place before one justice, or two or more, as may be directed in the Act of Parliament relating to the particular offence, or where there is no direction, then before any one justice of the county or place where the matter has arisen: and the public are to have access to the place of hearing, which is to be an open court (*y*): and the prosecutor is to be allowed to conduct

(*r*) 11 & 12 Vict. c. 43, s. 1, and see sect. 29. The form of the summons and of the other instruments under this Act, is given in a schedule thereto.

(*s*) In proceedings before magistrates, (as well as in other cases,) an affirmation, in lieu of oath, will suffice in the case of Quakers, Moravians or Separatists; and (with respect to the *witnesses*) will also suffice in the case of *any* persons unwilling to be sworn from conscientious scruples.

(*t*) Sects. 2, 3, &c.

(*u*) Sect. 11.

(*x*) Sect. 7.

(*y*) As to what constitutes an "open court," vide sup. p. 330.

his case, and to examine and cross-examine the witnesses, by his counsel or solicitor; and the like privilege is to be allowed to the defendant (*z*).

The hearing commences by a statement being made to the defendant of the substance of the information; and he may then show cause, if he can, why he should not be convicted; but if he do not admit the truth of what is charged, the court is to proceed to hear the prosecutor or his witnesses; and afterwards the defendant and his witnesses; and also to hear such witnesses as the prosecutor may examine in reply, if the defendant shall have given any evidence except as to his general character: but the former shall not be entitled to make any observations in reply upon the evidence given by the latter, nor the latter to make any observations in reply upon the evidence given by the former in reply. And when the evidence, which, unless where an "affirmation" (*a*) is permissible, is to be *upon oath*, shall be closed, the court shall proceed to convict, or make an order on, the defendant, or else dismiss the information, as the case may require (*b*); every conviction or order being drawn up in proper form by the clerk of the court, and registered and kept by him, so as to be open to inspection (*c*). And such clerk is also required to draw up and give to the defendant a certificate, if the information against him be dismissed (*d*).

The same proceedings take place *mutatis mutandis* (except that the attendance of the defendant cannot be enforced by warrant if the summons be disobeyed) where any written or verbal *complaint* is made to the court in respect of some matter wherein it has authority to make an order for the payment of money.

In all cases brought before them it is competent to the court to award costs to either party, and, in the case of an information, to enforce payment of them or of any pecuniary

(*z*) 11 & 12 Vict. c. 43, s. 12.
(*a*) Vide sup. p. 331, n. (*s*).
(*b*) See 42 & 43 Vict. c. 49, s. 16, et sup. p. 329.
(*c*) Sect. 22.
(*d*) 11 & 12 Vict. c. 43, s. 14.

penalty, by distress, and in default thereof by imprisonment for a limited period (*e*); or, (in the case of some offences) imprisonment may be awarded without the alternative of paying a sum of money. But should an order be made for money recoverable by *complaint* and not by information it is recoverable only as a civil debt, and can only (in default of distress or otherwise) be enforced by imprisonment after proof given that the party making default has the means to pay but neglects or refuses to do so (*f*); and then, the court of summary jurisdiction has the same power as a county court to enforce payment by the imprisonment authorized in such cases of contumacy by the Debtors Act, 1869 (*g*).

Power is also granted to the court, from time to time, to adjourn the proceedings as circumstances may require; and in the meantime either to allow the defendant to go at large, or to commit him to prison. Or, it may discharge him on entering into a recognizance, (either with or without sureties,) conditioned for his re-appearance at the adjournment day, which recognizance, if broken, is to be transmitted to the clerk of the peace to be proceeded upon (*h*).

Such is, in general, the method of summary proceedings before a justice or justices of the peace sitting as a court of summary jurisdiction. It is to be understood, however, that unless there be some enactment directing or permitting a prosecution in this summary manner, no offence is capable of being so dealt with; but the offender must be proceeded against either by indictment or information in the usual way. It also deserves notice, that a summary conviction is not in all cases conclusive; but is often subject to *appeal*, and, indeed, is always so (with the exception already

(*e*) Vide sup. p. 329, n. (*l*).

(*f*) 42 & 43 Vict. c. 49, ss. 6, 35.

(*g*) See 32 & 33 Vict. c. 62, et sup. vol. III. p. 291.

(*h*) 11 & 12 Vict. c. 43, ss. 16, 29. As to recognizances, vide sup. p. 284.

noticed) where the sentence is imprisonment without the option of a fine (*i*). And in the greater number of the statutes which authorize this course of proceeding in particular instances, an appeal to the quarter sessions is specially authorized (*j*). And in such cases, and if a question *of law* be involved, the decision of the quarter sessions may, in its turn, be brought under the review of the Queen's Bench division of the High Court of Justice (*k*).

Moreover, by 42 & 43 Vict. c. 49, s. 33 (*l*), any person aggrieved who desires to question a conviction, order, determination or other proceeding of a court of summary jurisdiction on the ground that it is erroneous in point of law or is in excess of jurisdiction, may apply to the court to state a *special case* setting forth the facts of the case and the grounds on which the proceedings are questioned, and, if the court decline to state the case, may apply to such High Court for an order requiring the case to be stated. On the other hand, the justice or justices themselves were enabled by 35 & 36 Vict. c. 26, to file affidavits in the court before which such special case has been brought, free of any expense by way of fee or stamp duty,—in order to put the court in possession of the grounds of their decision, and of any facts which they may consider as having a material bearing on the question at issue; and this without the necessity of appearing by counsel.

III. [To this head of summary proceedings may also be properly referred the method immemorially used by

(*i*) Vide sup. p. 330.

(*j*) The course of procedure in appeals from a court of summary jurisdiction to the sessions, is mainly regulated by 12 & 13 Vict. c. 45, as affected by 42 & 43 Vict. c. 49, ss. 31, 32.

(*k*) The mode of proceeding in such cases is, in general, by *mandamus*, requiring the quarter sessions to *re-hear* the appeal. (See Dickinson on Quarter Sessions, 6th ed., p. 658.)

(*l*) See also 20 & 21 Vict. c. 43, under which Act a special case may also be stated.

[the superior courts, of punishing contempts by *attachment*, and the subsequent proceedings thereupon.

The contempts which are thus punished, are either *direct;* which openly insult or resist the powers of the courts, or the persons of the judges who preside there. Or else are *consequential:* which, (without such gross insolence, or direct opposition,) plainly tend to create an universal disregard of their authority. The principal instances of either sort, that have been usually punished by attachment, are of the following kinds (*m*). 1. Those committed by inferior judges and magistrates: by acting unjustly, oppressively, or irregularly, in administering those portions of justice which are intrusted to their distribution; or by disobeying the royal writs issued out of the superior courts,—as by proceeding in a cause after it is put a stop to, or removed by writ of prohibition, certiorari, error, supersedeas, and the like. For as the superior courts have a general superintendence over all inferior jurisdictions,—any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court: by abusing the process of the law, or deceiving the parties, or by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty. 3. Those committed by solicitors, (who are also officers of the court,) by gross instances of fraud and corruption, injustice to their clients, or other dishonest practices. For the malpractice of the officers reflects some dishonour on their employers; and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen in collateral matters relating to the discharge of their office: such as making default when summoned; refusing to be sworn, or to give any verdict;

(*m*) Hawk. P. C. b. 2, c. 22.

[eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehaviour or irregularities of a similar kind;—but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict. 5. Those committed by witnesses: as by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any action or proceeding before the court: as by disobedience to any rule or order made in the progress of a cause, or by non-observance of an award duly made a rule of the court. However, the contempt in such cases as last mentioned, is in general consequential or constructive only; as it implies no actual disregard of authority, but may proceed from the poverty of the party. 7. Those committed by *any* persons: in the way of disobedience to the royal writs, or other disrespect to the court's authority. Some of these contempts may arise in the face of the court: as by rude and contumelious behaviour; by obstinacy, perverseness or prevarication; by breach of the peace, or any wilful disturbance whatever. Others in the absence of the party: as by disobeying or treating with disrespect the sovereign's writ, or the rules or process of the court; by perverting such writ or process to the purpose of private malice, extortion, or injustice; by speaking or writing contemptuously of the court, or judges acting in their judicial capacity; or by printing false accounts (nay, even true ones if against the prohibition of the court), of causes then depending in judgment (*o*); and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority, (so necessary for the good order of the kingdom,) is entirely lost among the people.

(*o*) See R. *v.* Clement, 4 B. & Ald. 218; In re Pollard, Law Rep., 2 P. C. Ca. 106; and the cases of Onslow, Whalley and Skipworth, reported in Law Rep., 9 Q. B. 219.

[The process of attachments for these and the like contempts, must necessarily be as antient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal (*p*). Accordingly we find it actually exercised, as early as the annals of our law extend. And though a learned author seems inclinable to derive this process from the Statute of Westminster the second, 13 Edward I. c. 39,—which ordains that in case the process of the king's courts be *resisted* by the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a quâ non deliverentur sine speciali præcepto domini regis;*" and that if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consentors, commanders and favourers, and that by a special writ judicial they shall be *attached* by their bodies to appear before the court; and that if they be convicted thereof they shall be punished at the king's pleasure, without any interfering by any other person whatsoever:—yet he afterwards more justly concludes, that it is a part of the *law of the land*, and as such is *confirmed* by the statute of *Magna Charta* (*q*).

If the contempt be committed in the face of the court, the offender may be instantly apprehended, and imprisoned at the discretion of the judges, without any further

(*p*) It may be here remarked that the jurisdiction with regard to contempts, which belongs to *inferior* courts, and in particular to the county courts, is confined to contempts committed in the court itself; and in the case of the last-mentioned courts is limited to the power given by the statutes under which they are created. See The Queen *v.* Lefroy, Law Rep., 8 Q. B. 134.

(*q*) Gilb. Hist. C. P. ch. 3.

[proof or examination (*r*). But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges, upon *affidavit*, see sufficient ground to suspect that an actual contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him (*s*); or, in very flagrant instances of contempt, the attachment issues in the first instance (*t*). This process of attachment is merely intended to bring the party into court; and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt (*u*). These interrogatories are in the nature of a charge or accusation; and must, by the course of the court, be exhibited within the first four days (*x*); and if any of the interrogatories be improper, the defendant may refuse to answer it, and move the court to have it struck out (*y*). If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury (*z*). If he confesses the contempt, the court will proceed to correct him, usually by fine or by imprisonment, or by both (*a*). If the contempt be of such a nature, that, when the fact

(*r*) Staundf. P. C. 73.

(*s*) Styl. 277.

(*t*) Anony., Salk. 84; R. *v.* Jones, Stra. 185; R. *v.* Cambridge, ib. 564.

(*u*) See The Queen *v.* Hemsworth, 3 C. B. 749.

(*x*) Saunders *v.* Melhuish, 6 Mod. 73.

(*y*) R. *v.* Barber, Stra. 444.

(*z*) Saunders *v.* Melhuish, ubi sup.

(*a*) See The Queen *v.* Hemsworth, ubi sup. A peer or lord of parliament is not exempted from process of attachment; at least if the contempt be gross—as by refusing to pay obedience to a writ of *habeas* to him directed. (R. *v.* Earl Ferrers, 1 Burr. 631; Lords' Journal, 7th Feb., 8th June, 1757.) As to the form of the warrant of commitment, see In re Fernandes, 6 H. & N. per cur. 726.

[is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of, the defendant may be admitted to make such simple acknowledgment, and receive his judgment, without answering to any interrogatories; but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court (*b*).]

(*b*) R. *v.* Elkins, 4 Burr. 2129.

CHAPTER XII.

OF ARRESTS ON CRIMINAL CHARGES.

WE are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; viz. that which is (as the general rule) pursued where the offence charged amounts to a felony or indictable misdemeanor (*a*). This subject may be distributed under eleven general heads, following each other in progressive order, viz.

1. Arrest. 2. Commitment and bail. 3. Prosecution. 4. Process. 5. Arraignment, and its incidents. 6. Plea, and issue. 7. Trial, and conviction. 8. Judgment, and its consequences. 9. Reversal of judgment. 10. Reprieve, or pardon. 11. Execution. All which will be discussed in the subsequent part of this book.

An *arrest*, in the sense here referred to, is the apprehending or restraining of the person of a man, in order, that he shall be forthcoming to answer an alleged or suspected crime. To this species of arrest all persons whatsoever are, without distinction, equally liable in criminal cases; and it may be either *by* warrant or *without*, according to the following distinctions:—

First. A *warrant* may be granted, in cases of treason or other offence affecting the government, by the privy council or by one of the secretaries of state (*b*): and a

(*a*) As to proceeding before a court of summary conviction, vide sup. p. 330.

(*b*) 1 Chit. Cr. L. 34, 107; Hawk. P. C. b. 2, c. 16; 4 Bl. Com. 290; see Kendal *v.* Row, 1 Ld. Raym. 65; R. *v.* Wilkes, 2 Wils. 151: R. *v.* Despard, 7 T. R.

judge of the Queen's Bench division of the High Court of Justice may also issue his warrant to bring before him for examination any person charged with felony (*c*). Moreover, such judge has authority, under 48 Geo. III. c. 58 (*d*), to grant a warrant against a person charged with any offence which may be prosecuted by indictment or information (on his being satisfied that an indictment has been found or information filed), in order that he may be held to bail or committed for trial. A like power to which is exercised both at the assizes and at sessions, upon indictments either for felony or misdemeanor found thereat respectively (*e*).

But warrants are ordinarily issued by justices of the peace out of sessions; a subject on which the law was in the year 1848, consolidated by 11 & 12 Vict. c. 42 (*f*).

This statute provides in substance, that in all cases where a charge, or complaint, shall be made before one or more justices of the peace,—alleging that any person

736; 11 Harg. St. Tr. 318. See also Sedley *v.* Arbouin, 3 Esp. 178, as to the power of a secretary of state to remove a prisoner by warrant from Ireland, in order to his trial in England. It may be here noticed that at one time a practice had obtained in the secretary of state's office, of issuing *general* warrants to take up, (without naming any persons in particular,) the authors, printers and publishers of such obscene or seditious libels as were particularly specified in the warrants. Although certain temporary Acts for the regulation of the press, on the provisions of which these warrants were grounded, expired in 1694, the same practice was inadvertently continued till a case arose in the year 1763,—wherein on such a warrant being issued to apprehend the authors, printers and publishers of a certain seditious libel, it was said by the Court of Queen's Bench to be void. (Money *v.* Leach, 1 Bl. Rep. 555.) After this case the issuing of such general warrants was expressly declared to be illegal, by a vote of the house of commons. (Com. Journ. 22nd April, 1766.)

(*c*) See 1 Chit. Cr. L. 36.

(*d*) This Act is in extension of previous enactments of 26 Geo. 3, c. 77, s. 18, and 35 Geo. 3, c. 46, which provided only for revenue prosecutions.

(*e*) 1 Ch. Cr. L. 339.

(*f*) The 11 & 12 Vict. c. 42, did not alter or affect any of the antecedent provisions contained in the Metropolitan Police Acts, or in the *London* Police Acts (sect. 29).

has committed, or is suspected to have committed, any treason or other felony, or any indictable misdemeanor or offence whatsoever, within the limit of his or their jurisdiction; or that any person who has committed, or is suspected to have committed, such offence out of his or their jurisdiction, resides, or is suspected to reside or be, within the same:—then, (if the party shall not be already in custody,) such justice or justices may issue to the constable or other peace officers of the county or place a warrant for his apprehension (*g*); and may cause him to be brought before him or them, or some other justice or justices of the same county or place, to answer the charge or complaint, and to be dealt with according to law; or he or they may, at their discretion, issue a summons, in the first instance,—in lieu of a warrant,—and forbear to proceed by warrant until the summons has been disobeyed. But herein there is this distinction; that where a warrant in the first instance is applied for, it must be grounded on an *information* or *complaint*, in writing and upon oath; but where only a summons is required, the information or complaint may be by parol, and no oath is necessary. The form of the warrant is prescribed by the statute itself; and a warrant properly penned, even though the magistrate who issues it should be in excess of his jurisdiction, and thus render himself liable to an action, will by statute 24 Geo. II. c. 44, at all events indemnify the officer who executes the same ministerially (*h*). On the other hand, when a warrant is received by the officer, he is bound to execute it in any place to which the jurisdiction of the magistrate and himself extends (*i*); and he may break open doors, in order to execute it, in case of treason, felony,

(*g*) 11 & 12 Vict. c. 42, s. 1. By sect. 2 the jurisdiction to issue a warrant extends to offences committed within the jurisdiction of the Admiralty, or abroad;—provided, that is, the case be one for which an indictment may legally be preferred in England or Wales.

(*h*) 4 Bl. Com. p. 291.

(*i*) Bl. Com. ubi sup.

or other indictable offence (*j*),—provided, on demand, admittance cannot otherwise be obtained (*k*). Nor is there any immunity from arrest in cases of the description just mentioned, even in the night time; nor from being arrested on a Sunday (*l*). A justice of the peace may also issue a warrant, not only to apprehend a person suspected of felony, but to search his premises for goods alleged to be stolen (*m*); and by 24 & 25 Vict. c. 96, s. 103, if any credible witness shall, upon oath, prove before him a reasonable cause to suspect that any person has in his possession, or on his premises, any property whatever, in respect to which any offence punishable under that Act shall have been committed,—the justice may grant a warrant to search for such property, as in the case of stolen goods: and any person to whom any such property shall be offered to be sold, pawned, or delivered, is required, (if in his power,) to apprehend and carry before a justice of the peace the person offering the same, together with such property (*n*).

A warrant from the chief or other justice of the Queen's Bench division of the High Court of Justice extends all over the kingdom; and is *tested*, (or dated,) *England;* not *Oxfordshire*, *Berks*, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be *backed*, that is, indorsed by a justice of the peace in another, as Middlesex, before it can be there executed (*o*). Formerly, regularly speaking, there ought to

(*j*) See Rawlins *v.* Ellis, 16 Mee. & W. 172.

(*k*) 1 Chit. Cr. L. 49. See Rawlins *v.* Ellis, ubi sup.

(*l*) See 29 Car. 2, c. 7, s. 6, and Rawlins *v.* Ellis, ubi sup.

(*m*) See 11 & 12 Vict. c. 42, s. 4.

(*n*) Re-enacting 7 & 8 Geo. 4, c. 29, s. 63, which was repealed by 24 & 25 Vict. c. 95. Some special provisions for the search of stolen property will be found in the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), as to which vide sup. vol. II. p. 79.

(*o*) 4 Bl. Com. p. 291. The report of the Criminal Code Bill Commission points out (p. 34) that the practice of requiring warrants to be backed had its origin at a period when constables were parish officers unknown beyond their immediate neighbourhood, and that since the general in-

have been a fresh warrant in every fresh county, but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes; of which the most recent are the 11 & 12 Vict. c. 42, and the 14 & 15 Vict. c. 55, s. 18. By these statutes a warrant issued in England or Wales may be backed, not only in another English county or place, but in Scotland, Ireland, or the Channel Islands, or *vice versâ* (*o*).

Secondly. [Arrest by officers *without warrant*, may be executed, 1. By a justice of the peace, who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace

troduction of county police (as to which vide sup. vol. II. p. 657) the system of backing has become a useless and sometimes mischievous formality,—"useless, because it can "be no protection against a forged "warrant, as a person capable of "forging a warrant would not hesi- "tate to commit perjury by swear- "ing to its signature: mischievous, "because it often causes delay which "enables criminals to escape."

(*o*) And see 11 & 12 Vict. c. 43, s. 3, as to backing warrants in cases of *summary conviction*. We may also notice here some other enactments of a character somewhat analogous to backing warrants. Thus by 6 & 7 Vict. c. 34, (amended by 16 & 17 Vict. c. 118,) provisions are made as to the apprehension, in the united kingdom, of persons committing treason and felony in any of her majesty's dominions *out* of the united kingdom. And *vice versâ*, as to the apprehension, in those dominions, of persons so offending in the united kingdom. Again, by 33 & 34 Vict. c. 52, the "Extradition Act, 1870," and 36 & 37 Vict. c. 60, the "Extradition Act, 1873," (Acts passed in order to facilitate the delivering up of criminals taking refuge in England, to the State of which they are the subjects,) it is enacted, that where any foreign State has entered into an arrangement with her majesty with respect to the surrender to such State of fugitive criminals, the enactments of the Extradition Acts shall be made to apply to such State by order in council. But no fugitive criminals shall be surrendered for offences of a *political character*. Arrangements for mutual surrender of fugitive criminals, at present exist with Austria, Belgium, Denmark, France, Germany, Italy, Switzerland, and the United States. As to the construction of the Extradition Act, 1870, see In re Counhaye, Law Rep., 8 Q. B. 410; The Queen v. Wilson, Law Rep., ib. 3 Q. B. D. 42. Some earlier statutes on this subject (viz., 6 & 7 Vict. cc. 75, 76; 8 & 9 Vict. c. 120; 25 & 26 Vict. c. 70; and 29 & 30 Vict. c. 121) are now repealed.

[in his presence (*p*); 2. The sheriff; and, 3. The coroner, who may apprehend any felon within the county, without warrant (*q*); 4. The constable (or peace officer), of whose office we formerly spoke, and who hath great original and inherent authority with regard to arrests (*r*). He may, without warrant, arrest any one for a treason, felony, or breach of the peace committed in his view, and carry him before a justice of the peace.] So upon a reasonable charge of treason, or any felony,—or of a dangerous wounding, whereby felony is likely to ensue,—or, upon his own reasonable suspicion that any of such offences have been committed, the constable may, without warrant, arrest the party so charged or suspected (*s*); and he will (in case of felony, though not, unless protected by statute, in misdemeanor) be justified in doing so though it should afterwards turn out that the party is innocent, or even that no such offence as was supposed had been in fact committed (*t*). He is also authorized in such cases as these, as well as upon a justice's warrant, to break open doors. Moreover, under the provisions of 24 & 25 Vict. cc. 97, 100, (relating respectively to malicious injuries to property and to offences against the person,) a constable may take into custody, without a warrant, any person whom he shall find lying or loitering in any highway, yard or other place during the night, and whom he shall have good cause to suspect of having committed, *or of being about to commit*, any

(*p*) 1 Hale, P. C. 86.

(*q*) Jervis on Coroners, 21.

(*r*) Vide sup. vol. II. p. 652.

(*s*) The Report of the Criminal Code Bill Commission suggests (p. 34) that warrants and summonses should not be refused by a magistrate merely because the alleged offender may be arrested without warrant; and adds that such (it is believed) expresses the spirit, though it is not to be found in the letter, of the present law. "We are, however, informed that some justices take a different view, and refuse in cases of felony to issue either a warrant or a summons, leaving the person applying for one to arrest the alleged offender on his own responsibility." (Ib.)

(*t*) See Davis *v.* Russell, 5 Bing. 354; Fox *v.* Gaunt, 3 B. & Ad. 798; Hogg *v.* Ward, 3 H. & N. 417; Griffin *v.* Coleman, 4 H. & N. 265; Galliard *v.* Laxton, 2 B. & Smith, 363.

of the various felonies provided against by either of those Acts; and he must take such person as soon as reasonably may be before a justice of the peace, to be dealt with according to law (*t*). So by 27 & 28 Vict. c. 47, s. 6, he may so arrest and deal with any person who having been sentenced to penal servitude holds a licence to be at large, and is reasonably suspected by him to have committed any offence or broken any of the conditions of such licence. So, also, by the Prevention of Crime Act, 1871, (34 & 35 Vict. c. 112), he is enabled thus to arrest (if authorized by the chief police officer of his district) any person whom he has reasonable grounds for believing to be getting his livelihood by dishonest means, or (even without such special authority) who is found in any place, public or private, under circumstances that show that he was about to commit, or was waiting for an opportunity to commit, some offence; or who is found in any house or in such other situations as are specified in the above Act, without being able to account satisfactorily for his being so found (*u*).

Again, there are cases in which, either at common law or else by the provisions of some statute, arrests without warrant are justifiable, whether the arrester be a peace officer or not. Among these it may be instanced (for a complete enumeration would be beyond our limits) that

(*t*) Moreover, within the *metropolitan police district*, a constable may take into custody without warrant, any person whom he may find, between sunset and the hour of eight in the morning, loitering or lying about and unable to give a satisfactory account of himself,—or any person charged with aggravated assaults,—or any person whose address cannot be ascertained, whom he shall find offending against the metropolitan police Acts. (See 10 Geo. 4, c. 44; 2 & 3 Vict. c. 47, ss. 36, 64, 65; 17 & 18 Vict. c. 33, s. 1.) The metropolitan police district embraces the whole county of Middlesex, and all other parishes or places within fifteen miles of Charing-cross, — with the exception of the City of London, which maintains a separate police establishment.

(*u*) 34 & 35 Vict. c. 112, s. 7. The constable, however, must satisfy the court before whom he brings his prisoner, that the circumstances were such as to justify the arrest without a warrant. (Ib.)

any private person (and *à fortiori* a peace officer), *who is present when any felony is committed*, is bound by the law to arrest the felon, on pain of fine and imprisonment, if he negligently permit him to escape (*v*). So any person may also apprehend another whom he shall find committing *any* indictable offence, by *night* (*x*); or whom he finds committing any of the larcenies and similar offences punishable under the 24 & 25 Vict. c. 96 (either upon indictment or summary conviction), except only the offence of angling in the day time; and he may carry such offender and the property (if any) found on him to a neighbouring justice, by him to be dealt with according to law. Again, by 24 & 25 Vict. c. 97, s. 61, any person found committing any malicious injury or other offence against that Act may be immediately apprehended, and carried to a justice, without warrant, either by a peace officer, or by the owner of the property injured, or his servant, or other person authorized by the owner (*y*). And, by 24 & 25 Vict. c. 99, s. 31, any person may apprehend any one whom he shall find committing any offence relating to the coin or other offence against that Act, and deliver him up to some peace officer. Moreover, at common law, any person (whether a peace officer or not) may, without warrant, not only in the case of any felony committed in his presence, justify breaking open doors in pursuit of the offender; but may also arrest any one for felony *on probable suspicion* (*z*). But there is this distinction between the case of the peace officer, and that of a private person; that the former (as we have seen) is protected though it should turn out that no such felony as supposed had been in fact committed by any

(*v*) Hawk. P. C. b. 2, c. 12.

(*x*) 14 & 15 Vict. c. 19, s. 11. As to the expression "found committing," see Downing *v.* Capel, Law Rep., 2 C. P. 461.

(*y*) See also 34 & 35 Vict. c. 112, s. 7, giving a similar power under certain circumstances to the owner of the premises (or his servants) on which a person is found, who is not able to give a satisfactory account of himself.

(*z*) 2 Hale, P. C. 78.

one, (provided he can show that he had reasonable ground for suspecting the party arrested): but the latter acts more at his peril; and is not protected, unless he can prove an actual commission of the crime by *some one*, as well as a reasonable ground for suspecting the particular person (*a*). It is also to be observed, that a private person cannot, on mere suspicion, justify breaking open doors; which a constable may do, even without a warrant (*b*).

[Finally, there is yet another species of arrest without warrant, and that is upon a *hue* and *cry* raised upon a felony committed (*c*). A hue (from *huer*, to shout) and cry, *hutesium et clamor*, is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another (*d*). If in a hue and cry, the constable, or peace officer, concur in the pursuit, he has the same powers, protection and indemnification, as if acting under a warrant of a justice of the peace.] Indeed all those who join in following upon a hue and cry that has been raised,—and that whether a constable be present or not,—will be justified in their apprehension of the party pursued, even though it should ultimately turn out that he is innocent, or that no felony has been committed (*e*); and, where the party pursued has taken refuge in a house, may break open the door to secure him, if admittance be refused (*f*). But if a man wantonly or maliciously raises a hue and cry without cause, he is liable to fine and imprisonment (*e*); and is also liable to an action at the suit of the party injured.

(*a*) Fost. 318. See Adams *v.* Moore, 2 Selw. N. P. 865; Moore *v.* Raye, 4 Taunt. 34; Beckwith *v.* Philby, 6 B. & C. 635; Williams *v.* Crosswell, 2 C. & K. 422.

(*b*) 4 Bl. Com. 292. See Smith *v.* Shirley, 3 C. B. 142. As to homicide in resisting an arrest by a private person, see 2 Hale, P. C. 84; Foster, 272, 309, 318.

(*c*) As to hue and cry, see 2 Hale, P. C. 100 et seq.

(*d*) The statutes relating to hue and cry, 13 Edw. 1, st. 2, cc. 1 and 4; 27 Eliz. c. 13, and 8 Geo. 2, c. 16; are repealed by 7 & 8 Geo. 4, c. 27.

(*e*) Hawk. P. C. b. 2, c. 12, s. 16.

(*f*) 2 Hale, P. C. 102.

In order to encourage the apprehension of offenders in certain cases, it was provided by 7 Geo. IV. c. 64, s. 28,—in the place of previous enactments of a similar kind,—that when a person shall appear to a court of oyer and terminer, or gaol delivery, to have been active in or towards the apprehension of one charged with murder, or a felonious and malicious shooting; or with an attempt to discharge loaded fire-arms at another person; or with stabbing, cutting or poisoning; or with administering anything to procure the miscarriage of a woman; or with rape, burglary or felonious housebreaking; or with robbery from the person; or with arson; or with horse, bullock, or sheep stealing; or with being accessory, before the fact, to any of the offences above enumerated; or with receiving any stolen property knowing the same to have been stolen,—the court is authorized to order the sheriff of the county to pay to such person such a sum of money as shall seem a reasonable and sufficient compensation for his, her, or their expenses, exertions and loss of time (*g*). But this power is to be exercised subject to such regulations, as to the rate of allowance, as shall be made from time to time by the secretary of state. And by 14 & 15 Vict. c. 55, s. 8, the above power of ordering compensation is extended, under certain limitations as to the amount, to any court of sessions of the peace,—in reference to such of the above-mentioned offences as they have jurisdiction to try (*h*).

(*g*) And see 7 Geo. 4, c. 64, s. 30, as to compensation to the families of those who are *killed* in attempting to apprehend persons charged with such offences as are mentioned in the text; and 14 & 15 Vict. c. 55, s. 7, providing that nothing in that Act, with regard to the regulations under which the power of allowance is to be exercised, shall interfere with the power of any court to order payment to any person who shall have shown extraordinary courage, diligence, or exertion in the apprehension. See also 19 & 20 Vict. c. 16, s. 13, as to compensation in cases removed for trial to the Central Criminal Court, under the provisions of that Act.

(*h*) The amount is limited to 5*l.* to any one person. As to the jurisdiction of the sessions, vide sup. p. 311.

CHAPTER XIII.

OF COMMITMENT AND BAIL.

WHEN a delinquent has been arrested by any of the means mentioned in the preceding chapter, he should be carried as soon as possible before a magistrate (*a*); and how he is then to be treated, is now to be shown under the head of *commitment* and *bail*.

The justices before whom a person charged with any indictable offence is brought up on warrant,—or who attends before the court voluntarily or in obedience to a summons,—are bound immediately to examine into the circumstances of the crime alleged (*b*); and to this end, the following provisions have been made by the statute 11 & 12 Vict. c. 42, and by the 30 & 31 Vict. c. 35 (*c*): viz. that the magistrates shall take, in the presence of the accused—who shall be at liberty to put questions to any witness produced against him by way of cross-examination (*d*),—the statement on oath or affirmation of those who know the facts of the case, and shall put the same into writing (*e*):—that the room in which such

(*a*) See Wright *v.* Court, 6 D. & R. 623.

(*b*) It may be remarked here that the regulations of the statutes as to how an accused person is to be examined apply, whether he appears voluntarily (on summons or otherwise) or has been brought up on warrant.

(*c*) This Act is often called "Russell Gurney's Act."

(*d*) As to the latitude allowed to the person charged by way of cross-examination before the magistrates before whom he is brought, and particularly in cases of *libel*, see R. *v.* Townsend, 10 Cox, Cr. Ca. p. 356.

(*e*) 11 & 12 Vict. c. 42, s. 17. Such a deposition may be afterwards used at the trial of the accused in the event of the deponent being then dead, or so ill as not to be able to travel or give evidence. (See The Queen *v.* Farrell, Law Rep., 2 C. C. R. 116; The Queen *v.* Wellings, ib. 3 Q. B. D. 426.) And the same course may be adopted with regard to a statement

examinations (or *depositions* as they are called) are taken shall not be deemed an open court; and that it shall be lawful for the justice or justices, if it appear to them most conducive to the ends of justice, to order that no person shall have access to the same (*f*):—and that after the examinations of all the witnesses on the part of the prosecution have been taken, and by them respectively signed, as well as by the examining magistrate, they shall be read over to the accused, who shall be asked if he wishes to say anything in answer to the charge, but at the same time cautioned that he has nothing to hope from any promise, or to fear from any threat, that may have been held out to him; and that (notwithstanding any such promise or threat), anything he may then say, may be read in evidence against him upon his trial. The statutes proceed to direct that whatever the accused person shall, after the above caution, say in answer to the charge shall be taken down in writing, and read over to him, and signed by the magistrate (*g*). The accused is then forthwith to be asked whether he desires to call witnesses, and in that case such justice or justices shall, in his presence, take the statement on oath or affirmation, both by way of examination and cross-examination, of those who shall be so called by him, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove his innocence, and shall put the same into writing (*h*). It is further provided:—that if, when all the evidence against the accused person shall have been heard, the

on oath or affirmation made before and signed by a justice under the provisions of 30 & 31 Vict. c. 35, s. 6, by any person *dangerously ill and not likely to recover*.

(*f*) 11 & 12 Vict. c. 42, s. 19.

(*g*) Sect. 18. As to this provision, see Reg. *v.* Stripp, 1 Dearsley's C. C. R. 648.

(*h*) 30 & 31 Vict. c. 35, s. 3. (See R. *v.* Townsend, 10 Cox, Cr. Ca. p. 356.) As to the expenses of such witnesses, see sect. 5. It is not the practice to examine the prisoner himself, otherwise than by thus calling on him for his defence; and this corresponds with the canon law, whereby, says Blackstone, (vol. iv. p. 296,) "*nemo tenetur prodere seipsum.*"

justice or justices shall be of opinion that it is not sufficient to put him upon his trial, they shall forthwith order him to be discharged; but that if they shall be of the opposite opinion, or if the evidence given raise a strong or probable presumption of his guilt, they shall either commit him to prison to take his trial (as hereafter mentioned), or admit him to bail,—that is, allow him to be discharged, on entering into a recognizance (with some sufficient surety or sureties), to appear and surrender himself to custody, and take his trial on such indictment as may be found against him, in respect of the charge in question, at the next assizes or sessions of the peace. If the charge cannot be properly investigated at a single hearing, it is the practice of the magistrates to *remand* the person accused from time to time, to be kept in safe custody and under proper restraint until he can either be discharged or committed. It is, however, in the discretion of the court to allow the person accused to remain at large during the period of the investigation.

The justices, however, have no power to admit any person to bail for *treason;* nor shall bail, in that case, be allowed except by order of a secretary of state, or of the Queen's Bench division of the High Court of Justice, or by a judge thereof in vacation: while, on the other hand, they are bound to admit to bail in all cases of misdemeanor, except such as the Act of 11 & 12 Vict. c. 42, particularly enumerates; and as to all felonies (treason excepted), as well as to the misdemeanors so enumerated, they have a discretionary power either to admit to bail (*h*), or to commit to prison (*i*).

(*h*) Formerly there were many other cases besides treason in which justices of the peace had no power to bail; for example, that of murder and of arson. (See 4 Bl. Com. 299.)

(*i*) The misdemeanors enumerated in 11 & 12 Vict. c. 42, for which justices are *not* obliged to take bail, but have a discretion in the matter, are as follows—assault with intent to commit felony; obtaining or attempting to obtain property by false pretences; receiving property stolen or obtained by false pretences; perjury or subornation of perjury; concealing the birth of a child by secret burying or otherwise; wilful and indecent exposure of the person;

[For a magistrate to refuse or delay to bail a person bailable, is an offence against the liberty of the subject by the common law (*j*), as well as by the statute of Westminster the first, 3 Edw. I. c. 15, and the *Habeas Corpus* Act, 31 Car. II. c. 2 (*k*). And lest the intention of the law in this matter should be frustrated by the justice requiring bail to a greater amount than the nature of the case demands, it was expressly declared by 1 W. & M. sess. 2, c. 2, that excessive bail ought not to be required; though what bail shall be called excessive must be left to the courts, on considering the circumstances of the case, to determine. And on the other hand, if the magistrate take insufficient bail, it is said that he is liable to be fined if the criminal doth not appear (*l*).]

Such, as the law now stands, is the power of the justices of the peace in bailing prisoners brought before them (*m*). It is to be understood, however, that in this matter the Queen's Bench division of the High Court of Justice (or a judge thereof) exercises a paramount jurisdiction;—such court having authority to bail, not only in cases where the charge is originally before them, but also in cases where it is brought before justices of the peace, and bail is there refused. [Nor is there any limit what-

riot; assault in pursuance of a conspiracy to raise wages; assault upon a police officer in the execution of his duty, or upon any person acting in his aid; neglect or breach of duty as a peace officer; and any misdemeanor, for prosecution of which costs may be allowed out of the county rate. (Sect. 23.)

(*j*) Hawk. P. C. b. 2, c. 15, s. 13. See Queen *v.* Badger, 4 Q. B. 468; Linford *v.* Fitzroy, 13 Q. B. 240.

(*k*) See also 56 Geo. 3, c. 100.

(*l*) Hawk. P. C. b. 2, c. 15, s. 6; and see 7 Geo. 4, c. 64, ss. 5, 6; R. *v.* Saunders, 2 Cox's Cr. C. 249.

(*m*) The court before which a prisoner is brought to plead, has also power to bail him. (4 Bl. Com. 297.) As to the power of bailing in the *metropolitan police courts*, see 2 & 3 Vict. c. 71, s. 36. See, also, 22 Vict. c. 33, enabling *coroners* to admit to bail persons charged with manslaughter, by the verdict of a coroner's jury.

[ever to the power of the court in this particular (*n*): which may bail for any crime whatsoever, be it treason (*o*), murder (*p*) or any other offence according to the circumstances of the case.] It is not usual, however, either for a judge or for magistrates, to admit to bail in a case of felony, except under circumstances of a special and favourable kind (*q*).

Supposing no bail to be allowed, or none to be found by the accused, he is then to be committed to prison by warrant of the examining magistrate, to be there safely kept until delivered by due course of law (*r*). [But this imprisonment is only for safe custody, and not for punishment; and therefore, in this dubious interval between the commitment and trial, a prisoner ought to be treated with the utmost humanity; and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purposes of confinement.] It was accordingly expressly enacted by the 28 & 29 Vict. c. 126, s. 32, that criminal prisoners before trial, though they shall have the option of employment, shall not be compelled to perform any hard labour (*s*); and again by the 40 & 41 Vict. c. 21, s. 39, that there shall be in force in every place in which prisoners shall be confined for safe

(*n*) 2 Inst. 189; Latch, 12; Vaug. 157; Comb. 111, 298; 1 Com. Dig. 493.

(*o*) In the reign of Queen Elizabeth, however, it was the unanimous opinion of the judges, that no court could bail a person committed on a charge of high treason, by any of the privy council. (1 Anders. 298.)

(*p*) Antiently felonious homicide seems to have been an exception. "*In omnibus placitis de felonid solet accusatus per plegios dimitti, præterquam in placito de homicidio.*" (Glan. l. 14, c. 1.) "*Sciendum tamen quod, in hoc placito, non solet accusatus per plegios dimitti, nisi ex regiæ potestatis beneficio.*" (Glan. l. 14, c. 3.)

(*q*) See Barronet's case, 1 Dearsley's C. C. R. 51.

(*r*) 11 & 12 Vict. c. 42, s. 25. See 28 & 29 Vict. c. 126, s. 56.

(*s*) If the prisoner elect to be employed and shall be acquitted, or no indictment be found against him, a reasonable allowance may be made to him on account of such his earnings. (Sect. 33.)

custody only, special rules regulating their confinement in such manner as to make it as little as possible oppressive, due regard only being had to their safe custody, to the necessity of preserving good order and good government in the place in which they are confined, and to the physical and moral well-being of the prisoners themselves. And, more particularly, such special rules are to be made in respect of the retention of books, papers or documents in the prisoner's possession at the time of his arrest; as to communications between him, and his solicitor or other friends; as to the arrangements with regard to his providing himself with diet, or being furnished with wholesome food; and as to his being protected from being called upon to perform unaccustomed tasks or offices.

Moreover, whether he is bailed or committed, the accused is entitled to demand, from the person having the custody of the same, copies of the examinations (or depositions) on which he shall have been bailed or committed, upon payment for them at a reasonable and prescribed rate (*t*). And the justice or justices are also empowered, in either case, to bind over by recognizance the prosecutor and witnesses to appear at the next assizes or sessions of the peace, at which the accused is to be tried, then and there to prosecute or to give evidence. And the several recognizances so taken, together with the written information (if any); the depositions; the statement of the accused; and the recognizance of bail (if any);—must be delivered to the proper officer at such assizes or sessions before or at the opening of the court, on the first day of its sitting (*u*).

(*t*) 11 & 12 Vict. c. 42, s. 27; 30 & 31 Vict. c. 35, s. 4. See Queen *v.* Lord Mayor of London, 5 Q. B. 555; R. *v.* Davies and others, 1 L. M. & P. 323.

(*u*) 11 & 12 Vict. c. 42, s. 20; 30 & 31 Vict. c. 35, s. 3. Under the provisions of 19 & 20 Vict. c. 16, where any person shall have been committed or held to bail for any

felony or misdemeanor alleged to have been committed out of the jurisdiction of the Central Criminal Court, the Queen's Bench division of the High Court of Justice, (or any judge thereof in vacation,) may, if it shall appear expedient to the ends of justice, order the trial of such person to take place at the Central Criminal Court. In such case, the examining justice, coroner, or other officer in whose custody the indictment or inquisition against the person charged may be,—must forthwith transmit to the proper officer of the Central Criminal Court any recognizances, depositions, examinations, or informations relating to the offence charged, to be kept among the records of the Central Criminal Court.

CHAPTER XIV.

OF THE SEVERAL MODES OF PROSECUTION.

THE next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation (*a*). And this may be either by *presentment* of a grand jury, or by *indictment* by them found, or by *information*.

I. A presentment, properly speaking, is the notice taken by a grand jury, of any matter or offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the Crown (*b*):—as the presentment by them of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it (*c*). The term "presentment," however, also includes inquisitions, and, in particular, an "inquisition of office," which is the inquest of a jury summoned by the proper officer to inquire of matters relating to the Crown, upon evidence laid before them. Most kinds of inquisitions [may be afterwards traversed and examined (*d*); as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide (*e*): for, in such cases, the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it:

(*a*) Vide sup. p. 340.

(*b*) Lamb. Eirenarch. l. 4, c. 5.

(*c*) 2 Inst. 739.

(*d*) But an inquisition of *felo de se* cannot be traversed, nor (under the former law) of *deodands*, nor of *flight* in felony, nor presentments of petty offences in the *tourn* or *leet*. (4 Bl. C. 301.)

(*e*) In cases of homicide the person accused may also be committed and tried on a *coroner's inquisition* (as to which, vide sup. vol. II. p. 641); but it is remarked in the Report of the Criminal Code Bill Commission (p. 33), that "it is the "common, though not universal, "practice to take a prisoner com- "mitted by the coroner before "magistrate."

[which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.]

II. An *indictment* is a written accusation that one or more persons have committed a certain felony or misdemeanor,—such accusation being preferred to, and (being found to be true) afterwards presented to the court upon oath by a grand jury (*f*). [To this end the sheriff of every county is directed by precept issued for the purpose, to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and loyal men of the county,—that they may inquire into, present, do, and execute all those things which, on the part of our lady the queen, shall then and there be commanded them (*g*).] At the sessions of the peace, their qualification is the same as required for petty jurors in the trial of civil causes at the courts of assizes or nisi prius. The qualification for grand jurors at the assizes is not absolutely defined by law: they ought, indeed, to be freeholders, but to what amount is uncertain (*h*). [However, they are usually gentlemen of the best figure in the county (*i*). As many as appear upon the panel returned are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three, that twelve may be a majority (*k*). Which number, as well as the constitution itself, we find

(*f*) It is explained in the Report just referred to (p. 32), that in theory the grand jury are the sole accusers —"presenting," in such character, certain persons to the royal commissioners who are sent through the country to deliver the gaols. But "inasmuch as they have long "ceased to report matters within "their own knowledge, and have "come to act upon information sup-"plied by others, anyone can send "up a bill before them accusing any "person of any offence whatever "with certain specified exceptions." (Ibid.)

(*g*) 2 Hale, P. C. 154.

(*h*) Ib. 155.

(*i*) See 1 Chit. Cr. L. p. 238.

(*k*) See R. *v.* Marsh, 6 Ad. & El. 236. By 30 & 31 Vict. c. 35, s. 8, a juror unwilling from conscientious scruples to be sworn, on satisfying the court of the sincerity of such scruples, may make solemn affirmation instead of an oath.

[exactly described so early as the laws of King Ethelred (*l*): —"*Exeant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare nec aliquem noxium celare.*" In the time of King Richard the first (according to Hoveden), the process of electing the grand jury, ordained by that prince, was as follows:—four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district.] This number was probably found too large and inconvenient; but the traces of the institution long remained: for until dispensed with by 6 Geo. IV. c. 50,.s. 13, it was held to be necessary that some of the jury should be summoned out of every hundred (*m*). [This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw to sit and receive indictments, which are preferred to them in the name of the sovereign, but at the suit of some private prosecutor:] and they only hear the testimony of such witnesses as shall appear on behalf of the prosecution, having neither the person accused nor any witnesses on his behalf before them (*n*): [for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire whether there be sufficient cause to call upon the party to answer it (*o*). A grand jury, however, ought to be thoroughly

(*l*) Wilk. LL. Angl. Sax. 117.

(*m*) 2 Hale, P. C. 154; 4 Bl. Com. 303.

(*n*) By 19 & 20 Vict. c. 54, the foreman of the grand jury is authorized to administer an oath, (or affirmation where such is allowed by law,) to all persons appearing before them to give evidence. Before this Act, such administration had to be in open court.

(*o*) Upon an indictment for high treason against the Earl of Shaftesbury, in the year 1681, the evidence was given *in public* before the grand jury at the Old Bailey; and the gentlemen of the jury expressing some doubts with regard

[convinced of the truth of an indictment, so far as the evidence goes: and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes (*q*).] And by 22 & 23 Vict. c. 17 (amended by 30 & 31 Vict. c. 35, s. 1), passed "to prevent vexatious indictments," it was provided that no bill of indictment shall be presented to the grand jury or shall be found by them for offences of a certain description, unless there is such recognizance given by the prosecutor as mentioned in the statute; or unless the person accused has been committed or bound over to appear to answer an indictment for the offence after a preliminary investigation before the magistrates (*r*); or

to the legality of the proceeding, Lord C. J. Pemberton and C. J. North both declared that it had always been the practice to examine the witnesses publicly before the grand jury, whenever it had been requested by those who prosecuted for the king. (3 Harg. St. Tr. 417.) But it is apprehended this is the last instance of such a procedure. (Christian's Blackstone.) It seems that an improper mode of swearing the witnesses before a grand jury will not vitiate the indictment. (R. *v.* Russel, 1 Car. & M. 247.)

(*q*) St. Tr. iv. 183.

(*r*) As to such investigation, see the preceding Chapter. It may be noticed here that the Report of the Criminal Code Bill Commission (p. 32) points out that the existence of the power to send up a bill before a grand jury without a preliminary inquiry before a magistrate, which under the present law is only necessary in certain cases as provided for by the Vexatious Indictments Act, 22 & 23 Vict. c. 17, affords facilities for abuse, inasmuch as any person may go before a grand jury without giving notice of his intention; and may there produce witnesses, of whose evidence no record is kept, on whose testimony, if a primâ facie case be made out, the bill will probably be found; and that on this, the prosecutor would be entitled to a certificate from the officer of the court that the indictment had been found; on which certificate he could procure a warrant for the arrest of the person indicted, till the next assizes, without his having any means of discovering on what evidence he was charged, or other information as to his alleged offence, beyond what he could get from the warrant. And it suggested (in the same Report) that for this and other reasons the principle of the Vexatious Indictments Act should be extended to all offences whatever, except those which are tried on criminal informations.

unless such consent or direction be given for the prosecution as the statute specifies (*s*).

[The grand jury are sworn to inquire only for the body of the county, *pro corpore comitatûs*, but for no other part of the kingdom; and therefore they cannot regularly inquire of a fact done out of the county for which they are sworn, unless particularly enabled to do so by Act of Parliament. And to so high a nicety was this matter antiently carried, that where a man was wounded in one county and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them:] but by statute 2 & 3 Edw. VI. c. 24, he was rendered indictable in the county where the party died; and by statute 7 Geo IV. c. 64, (repealing that of Edward the sixth,) he is now made indictable in either. And so also in other cases; as particularly where *treason* is committed out of the realm, it may be inquired into within the realm, [in pursuance of statutes 26 Hen. VIII. c. 13; 35 Hen. VIII. c. 2, and 5 & 6 Edw. VI. c. 11 (*t*).] And there are to be found in the statute book, a variety of specific exceptions from the principle that an offender must be tried in the county in which the offence is committed,—which have been introduced, from time to time, to prevent the failure of justice, or to promote its convenient admi-

(*s*) See Ex parte Wason, Law Rep., 4 Q. B. 573. The offences named in the 22 & 23 Vict. c. 17, are the following:—Perjury, subornation of perjury, conspiracy, obtaining property by false pretences, keeping a gambling-house, keeping a disorderly house, and any indecent assault. The consent or direction referred to in the text, may be given by any of the judges; the attorney or the solicitor-general; the court itself before whom the indictment shall be preferred; or (in a charge of perjury) any court or person authorized to direct a prosecution for that offence by 14 & 15 Vict. c. 100. (As to which, see The Queen *v.* Bray, 3 B. & Smith, 255.) By 30 & 31 Vict. c. 35, s. 2, a person indicted under the provisions of 22 & 23 Vict. c. 17, and acquitted at his trial, may, in some cases, be directed by the court to receive his reasonable costs and expenses from the prosecutor.

(*t*) 4 Bl. Com. p. 303. Another statute on the subject mentioned by Blackstone, viz. 33 Hen. 8, c. 23, was repealed by 9 Geo. 4, c. 31.

nistration, and with regard to which the reader must be referred to the books of criminal practice. We may, however, notice here that, under the authority of 42 Geo. III. c. 85, all offences committed by persons employed by the Crown in any station abroad, in the exercise or under colour of their office, may be tried in England (*u*); and that the same is the case as to offences committed at sea, or within the Admiralty jurisdiction (*x*). We may also notice the following more general provisions. By 38 Geo. III. c. 52, where an offence has been committed within a county corporate (*y*), the indictment may be preferred to the jury of the next adjoining county (*z*). By 7 Geo. IV. c. 64, s. 12, where any indictable offence shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another,—it may be dealt with and tried in any of such counties (*a*). And by 4 & 5 Will. IV. c. 36, s. 3, it is provided as to all offences committed within the jurisdiction of the "Central Criminal Court" (*b*), that the whole metropolitan district over which it extends shall be considered, for the purpose of indictment, as one county (*c*). Besides all which, it is

(*u*) And see 11 Will. 3, c. 12; 8 East, 31; and the case of The Queen *v.* Eyre, Law Rep., 3 Q. B. 487.

(*x*) See 4 & 5 Will. 4, c. 36, s. 22; 7 & 8 Vict. c. 2; 17 & 18 Vict. c. 104, s. 267; 18 & 19 Vict. c. 91; 24 & 25 Vict. c. 96, s. 115; c. 97, s. 72; c. 98, s. 36; c. 99, s. 36; c. 100, s. 68; 30 & 31 Vict. c. 124; 41 & 42 Vict. c. 73. In certain cases, moreover, by 12 & 13 Vict. c. 96, offences committed within the Admiralty jurisdiction, may be tried in the courts of the colony, (including *India*, see 23 & 24 Vict. c. 88,) where the person is charged.

(*y*) Vide sup. vol. I. p. 132. This enactment does not extend to London, Westminster or Southwark. (See 38 Geo. 3, c. 52, s. 10; 5 & 6 Will. 4, c. 76, s. 109.)

(*z*) As to the indictment in such cases, see 14 & 15 Vict. c. 100, s. 23.

(*a*) As to this provision, see R. *v.* Mitchell, 2 Gale & D. 274.

(*b*) As to this court, vide sup. p. 310.

(*c*) The jurisdiction of this court also comprises offences committed at sea (vide sup. p. 306). It may be observed here, that persons convicted in this court on an indictment

to be remarked in reference to this subject, that, independently of legislative provision, some offences admit at common law of inquiry and trial in more counties than one. Thus in treason committed within the realm, the indictment may be in any county in which any one overt act can be proved (*d*); and in conspiracy, in any county in which any act may have been committed in furtherance of the common design (*e*). So if a man commit larceny in one county, and carry the goods with him into another, he may be indicted in either: for the law considers this as a taking in both (*f*).

[When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill "*ignoramus*," or we know nothing of it: intimating that though the facts might possibly be true, that truth did not appear to them; but now they assert in English more absolutely, "not a true bill," or (which is the better way) "not found," and then the bill is said to be "thrown out," and the party is discharged without further answer (*g*). But a fresh bill may afterwards be preferred to a *subsequent* grand jury (*h*). On

or inquisition removed thither under 19 & 20 Vict. c. 16, may, (by sect. 19 of that Act,) be sentenced and punished either in the county where the offence was committed, or at any place within the jurisdiction of the Central Criminal Court.

(*d*) Deacon's case, Foster, 10.

(*e*) R. *v.* Brisac and Scott, 4 East, 164.

(*f*) 1 Hale, P. C. 507; 2 Hale, P. C. 163; 4 Bl. Com. 305. Also by the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 114), if property be stolen or otherwise feloniously taken in one part of the united kingdom, and the offender afterwards have it in his possession in any *other* part of the united kingdom,—he may be dealt with for larceny or theft in that part where he shall so have such property, as if he had actually stolen or feloniously taken it there. And a receiver of stolen property may be dealt with in that part of the united kingdom where he shall receive the property, as if it had been originally stolen there.

(*g*) If the bill be thrown out by the grand jury, the party must be discharged without the payment of any fees. (8 & 9 Vict. c. 114.)

(*h*) But if the grand jury at the assizes or sessions have thrown out a bill, they cannot find another bill against the same person for the same offence, at the *same* assizes or sessions. (R. *v.* Humphreys, 1 Car. & Mar. 601.)

[the other hand, if they are satisfied of the truth of the accusation, they indorse upon it, "a true bill;" antiently "*billa vera.*" The indictment is then said to be *found;* and the party stands indicted. But to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives and liberties of the subjects, that no man can be convicted at the suit of the Crown upon an indictment, unless by the unanimous voice of twenty-four of his equals and neighbours; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards by the whole petty jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree (*m*). And the indictment when so found (or not found, as the case may be) is then returned, or publicly delivered into court: and the finding of the jury openly proclaimed.]

Indictments must have a precise and sufficient certainty; and, in their margin, they always mention the county in which the offence was committed: which is done by way of *venue*, that is, by way of indicating from what county the jurors came, by whom the indictment was found. In the body also of this instrument there was formerly always inserted,—by way of more particular venue, and to indicate the place from whence the petty jury, who are afterwards to try the fact, would, according to the antient usage, have been summoned (*n*),—an allegation of the town, hamlet, or parish, in which the fact is supposed to be committed, as well as the day of its commission (*o*). But by 14 & 15 Vict. c. 100, s. 23, it

(*m*) 2 Hale, P. C. 161.

(*n*) At common law, the petty jury, who were to try the fact in issue, were summoned from the particular place where the fact in issue occurred. (See Hawk. P. C. b. 2, c. 23, s. 92.) But this principle is now obsolete with regard to both civil and criminal proceedings. And by 6 Geo. 4, c. 50, s. 13, they are now to be summoned from the body of the county; and not even from any particular hundred within the same.

(*o*) See R. *v.* Brookes, 1 Car. & M. 543.

was made unnecessary to state any *venue* in the body of the indictment; but the county in the margin shall be taken to be the venue for all the facts; except where it is requisite to state a place by way of local description, and not merely as venue; in which case the place shall still be stated in the body of the indictment. So, by the same statute (sect. 24) an omission in the indictment to state the *time*, or any imperfect statement of it,—where time is not of the essence of the offence,—shall not constitute any objection (*p*). But cases occasionally occur in which time *is* of the essence of the offence, for example, where there is any limitation in point of time assigned for the prosecution of offenders. [An instance of this arises in the statute 7 & 8 Will. III. c. 3, which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned, (except an assassination, designed or attempted, of the person of the sovereign,) unless the bill of indictment be found within three years after the offence committed (*q*); and so also, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given.]

In other respects, also, indictments must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5, all indictments were required to set forth the christian name, surname, and addition of the state and degree, mystery, town, or place, and the county of the offender; and all this to identify his person; but in a case where the name of the person charged was unknown, and he refused to disclose it, an indictment against him as a person whose name was to the jurors unknown, but who was personally brought before them by the keeper of the prison, was held, notwithstanding the above enactment, to be sufficient (*r*). And now by 14 & 15 Vict. c. 100, s. 24, it has been enacted that no want of, or imperfection in, the addition

(*p*) The law seems to have been nearly the same, even before this statute. (4 Bl. Com. 306.)

(*q*) Foster, 249.

(*r*) Anon., R. & R. C. C. R. 489.

of the defendant shall vitiate an indictment; nor the designation of any person by a name of office or other descriptive appellation, instead of by his proper name (*s*). [Again, the offence itself must also be set forth with clearness and certainty (*t*); and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus in treason, the facts must be laid to be done "treasonably and against his allegiance;" antiently, "*proditoriè et contra ligeantiæ suæ debitum;*" else the indictment is void. In indictments for murder, it is necessary to say, that the party indicted "murdered," not "killed" or "slew," the other; which, till the statute 4 Geo. II. c. 26, directing all proceedings in courts, concerning the law and administration of justice, to be in English, was expressed in Latin by the word "*murdravit.*" In all indictments for felonies, the adverb "feloniously" must be used; and for burglaries, also "burglariously;" and all these to ascertain the intent. In rapes, the word "ravished" is necessary, and must not be expressed by any periphrasis; and this, in order to render the crime certain. So in larcenies, also, the words "feloniously took and carried away" are necessary to every indictment; for these only can express the very offence (*u*). In addition to which we may remark, that where the offence is created by an Act of Parliament, the words of the statute, which describe the offence, should be exactly pursued (*x*).]

The precision indeed of our pleadings, up to a recent period, was carried to an extravagant length, tending to an excessive subtlety and overstrained observance of form,

(*s*) As to the case of a corporation, see 2 Gale & D. 236.

(*t*) See Reg. *v.* Rowed, 3 Q. B. 180; The Queen *v.* Bradlaugh, Law Rep., 3 Q. B. D. 180.

(*u*) See R. *v.* Crighton, R. & R. C. C. R. 62.

(*x*) See R. *v.* Jukes, 8 T. R. 536.

very prejudicial to the interests of justice. This blemish on our jurisprudence it has been the constant effort of modern legislation to efface; though the steps of that improvement have been cautious and progressive. Some notice of this in reference to *civil* cases, has been taken in the preceding volume; and such improvements as chiefly deal with the manner in which the various offences of which we have spoken may now respectively be dealt with in the framing of an indictment, it would be inconvenient to recount in detail in a treatise such as the present (*y*). But some provisions of a more general nature shall here be briefly noticed.

And, first, by 9 Geo. IV. c. 15, and 11 & 12 Vict. c. 46, s. 4, the judges at the assizes were empowered, at their discretion, to cause an indictment or information for any offence whatever, to be forthwith amended by an officer of the court, when any *variance*, shall appear between some matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending. And by 12 & 13 Vict. c. 45, s. 10, the same powers of amendment were entrusted to every court of general or quarter sessions of the peace.

Again, by 14 & 15 Vict. c. 100, s. 1 (*z*), it was provided in much wider terms, that whenever on the trial of an indictment (*a*), there shall appear to be a variance

(*y*) The following enactments, however (amongst others), may be consulted in reference to the extent of these relaxations of the antient strictness in framing indictments. *Coining*, 24 & 25 Vict. c. 99, s. 37; *cutting and wounding*, 14 & 15 Vict. c. 19, s. 5; *embezzlement* and *obtaining money under false pretences*, 12 & 13 Vict. c. 103; 14 & 15 Vict. c. 100, s. 18; 24 & 25 Vict. c. 96, ss. 72, 88; *forgery*, 24 & 25 Vict. c. 98, s. 44; *larceny*, 24 & 25 Vict. c. 96, ss. 5, 92; *murder* and *manslaughter*, 24 & 25 Vict. c. 100, s. 6; *post-office offences*, 11 & 12 Vict. c. 88, s. 5; *perjury*, 14 & 15 Vict. c. 100, ss. 20, 21; *receiving stolen property*, 24 & 25 Vict. c. 96, s. 94; *robbery*, 24 & 25 Vict. c. 96, s. 41; *treason-felony*, 11 & 12 Vict. c. 12, s. 5.

(*z*) As to the construction of this Act, see Sill's case, 1 Dearsley's C. C. R. 132; Frost's case, ib. 474; The Queen *v.* Green, 26 L. J., M. C. 17; The Queen *v.* Gumble, Law Rep., 2 C. C. R. 1.

(*a*) For the purposes of the Act this term includes an information,

between the statement therein and the evidence offered as to the name of any county, riding, division, city, borough, town corporate, parish, township or other place: or in the name or description of any person therein alleged to be the owner of property (real or personal) forming the subject of the offence charged, or alleged in the indictment to be injured or damaged, or intended to be injured or damaged, by such offence; or in the name or description of any person, matter or thing therein named or described; or in the ownership of any property named or described therein:—it shall be lawful for the court before which the trial shall be had, in any of the above cases, if it shall consider such variance *not material to the merits of the case*, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order the indictment to be amended, according to the proof, by an officer of the court or some other person; on such terms as to postponing the trial, to be had before the same or another jury, as the court shall think reasonable.

And by the same statute, ss. 5, 7, and 24 & 25 Vict. c. 98, ss. 42, 43, that whenever it shall become necessary, in any indictment, to make averment as to an instrument which shall consist wholly or in part of writing, print or figures; —it shall be sufficient to describe such instrument by any name, description or designation by which it is usually known, (or by the purport thereof,) without setting forth any copy or fac-simile.

Moreover, by 14 & 15 Vict. c. 100, s. 9, if on the trial of one indicted for a felony or misdemeanor, it shall appear to the jury that he did not complete the offence charged in the indictment, but was guilty only of an *attempt* to commit the same, the jury may find accordingly, and he shall be punished in the same manner as if he had been indicted for the attempt only.

By the same statute (sect. 12), if upon the trial of a person indicted for any misdemeanor, it shall appear that

inquisition, or presentment, and also any plea, replication or other pleading, and any *nisi prius* record. (14 & 15 Vict. c. 100, s. 30.)

the facts given in evidence amount in law to a felony, he shall not by reason thereof be entitled to be acquitted of the misdemeanor; but he shall not be liable to be afterwards prosecuted for the felony, unless the court shall think fit to discharge the jury from giving any verdict, and shall direct an indictment for the felony; in which case he shall be dealt with, in all respects, as if he had not been put on his trial for the misdemeanor.

And, finally, by 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record;" or the words "with force and arms;" or the words "against the peace;" nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versâ;* nor for that any person is designated by a name of office or other descriptive appellation, instead of his proper name; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment; or on an impossible day, or on a day that never happened: nor for want of a proper or perfect venue; nor for want of a proper or formal conclusion; nor for want of or imperfection in the addition of any defendant; nor for the want of the statement of the value or price of any matter or thing; or of the amount of damages, injury or spoil;—in any case where the value or price, or the amount of damage, injury or spoil, is not of the essence of the offence (*b*).

(*b*) It may be observed that an indictment may contain more than one *count* (or accusation) that the person charged has committed the offence in respect of which he is arraigned. Moreover, if a person is found guilty at his trial of more than one offence, his punishment may be directed at the discretion of the court, to be either *concurrent* or *cumulative*. If concurrent, the term of penal servitude or imprisonment

III. There is another method of prosecution which dispenses with any previous finding by a jury (either by way of presentment or indictment) to fix the authoritative stamp of verisimilitude upon the accusation (*b*).

[An instance of this, by the common law, was when a thief was taken *with the mainour*, that is, with the thing stolen upon him *in manu*. For he might, when so detected *flagrante delicto*, be brought into court, arraigned, and tried without indictment; as, by the Danish law, he might be taken and hanged upon the spot, without accusation or trial. But this proceeding was taken away by several statutes in the reign of Edward the third; so that the only species of prosecution without a previous indictment or presentment by a grand jury, now seems to be that of information.]

The term *Information* is variously applied in our law. We understand by it, either a charge laid before justices of the peace sitting as a court of summary jurisdiction; or else a complaint (or *qui tam* action) exhibited in a court of law by a common informer, in order to recover a penalty awarded by some enactment to the first who shall

will extend only over the longest period awarded in respect of any of the offences charged; but if cumulative, then the punishment awarded in respect of each offence may be directed to take place at the expiration of each period in succession, till they have been all undergone.

With regard to the *form* of indictments, it is remarked in the Report of the Criminal Code Bill Commission (p. 35), "that the law as "it at present stands is in the form "of objectionable unwritten rules, "qualified by several wide excep- "tions which modify some of their "defects. These general rules re- "quire the greatest minuteness in "many matters, which need not be "referred to here. Two rules, how- "ever, may be specially mentioned, "(1) Indictments must not be double "and cannot be in the alternative; "each count must charge one offence "and no more. (2) All material "averments must be proved as laid. "Although these rules have been "considerably relaxed in practice, "the effect of them is that indict- "ments run to a most inordinate "length, and become at once so "long and so intricate that it is "hardly possible to understand "them, and that practically no one "reads them but the counsel who "draw and the clerks who copy "them."

(*b*) See 4 Bl. Com. p. 307.

inform against its breach, (a penalty which usually goes half to the Crown and half to the informer); or, again, a complaint exhibited in the name of the Crown itself, in respect of some civil claim from a subject:—or, lastly, a complaint by the Crown filed in the Queen's Bench division of the High Court of Justice, in respect of some offence under the degree of treason or ordinary felony. It is to informations of the last species only, that our attention is to be at present directed; the others being sufficiently noticed, in other parts of our work, under their appropriate heads.

[The informations then that are exhibited in the name of the sovereign, in criminal cases, are of two kinds; first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney-general: secondly, those in which, though the Crown is the nominal prosecutor, yet it is at the relation of some private person or common informer. And these last are filed by the sovereign's coroner and attorney, usually called "The Master of the Crown Office;" who is, for this purpose, the standing officer of the public (*c*).

The object of the sovereign's own criminal informations, filed *ex officio* by his attorney-general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution by this method, without waiting for any previous application to any other tribunal: which power, thus necessary not only to the ease and safety, but even to the very existence of the executive government, was originally reserved in the great plan of the English constitution,

(*c*) See R. *v.* Smithson, 4 B. & Ad. 861; R. *v.* Eve, 5 Ad. & El. 780; R. *v.* Larrieu, 7 A. & E. 277. One species of such information is that in the nature of a writ of *quo warranto*.

[wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of criminal informations,—that is to say, such as are filed by the master of the Crown office upon the complaint or relation of a private subject,—are any gross and notorious misdemeanors, riots, batteries, libels and other immoralities of an atrocious kind, not indeed peculiarly tending to disturb the government, (for those are left to the care of the attorney-general,) but which, on account of their magnitude or pernicious example, deserve the most public animadversion (*d*).] In such cases as these, the course is for the party aggrieved to move the Queen's Bench division for a rule to show cause why a criminal information should not be filed; and such motion, in case of libel, must be supported by an affidavit expressly denying the truth of the imputation (*e*). This rule, if granted, is served on the defendant according to the ordinary course of practice on motions; and, if no sufficient cause be shown, is made absolute, and an information filed accordingly. And when either kind of criminal information has been thus filed, the truth of the facts alleged must afterwards be tried by a petty jury of the county wherein the offence arose (unless, indeed, the case be of such importance as to require to be tried *at bar*); and it is so tried either by a common or special jury, like an ordinary action; and if the verdict be for the Crown, the defendant is afterwards brought up for judgment before the High Court.

[There can be no doubt but that this mode of prosecu-

(*d*) Hawk. P. C. b. 2, c. 26, s. 1 (see R. *v.* Marshall, 4 Ell. & B. 480). It may be noticed that one who applies for and obtains a criminal information, is thereby concluded from bringing an action in respect of the same grievance. (See R. *v.* Sparrow, 2 T. R. 198, Hil. 1788; Walker *v.* Cooke, 16 M. & W. 344.) Moreover, this prerogative remedy will not, as the general rule, be exercised unless the person in whose behalf it is sought be one who fills some public and high position, such as a magistrate and the like. (See Ex parte Duke of Marlborough, 5 Q. B. 955.)

(*e*) R. *v.* Wright, 2 Chit. Rep. 162.

[tion by information (or suggestion) filed on record by the attorney-general, or by the master of the Crown Office, is as antient as the common law itself. For, as the sovereign was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit; so, when these, his immediate officers, were otherwise sufficiently assured that one had committed a gross misdemeanor, either personally against him or his government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the court of king's bench by a suggestion on record, and to carry on the prosecution in the name of the crown. But these informations (of every kind) are confined, by the constitutional law, to mere misdemeanors only: for wherever any felonious offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it (*f*). And, as to those offences, in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's court of king's bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the statute 3 Hen. VII. c. 1, had extended the jurisdiction of the court of Star-Chamber, the members of which were the sole judges of the law, the fact and the penalty; and when the statute of 11 Hen. VII. c. 3, had

(*f*) "Any *capital* offence" is the expression of Blackstone (4 Bl. Com. p. 310). And in this he agrees with Sir M. Hale (2 Hale, P. C. 151). But the doctrine seems to extend to felonies generally, whether capital or not. (See Com. Dig. "Information," A. 1; 1 Chit. C. L. 844.)

[permitted informations to be brought by any informer upon any penal statute, (not extending to life or member,) at the assizes, or before the justices of the peace, who were to hear or determine the same according to their own discretion; then it was that the legal and orderly jurisdiction of the court of king's bench fell into disuse and oblivion; and Empson and Dudley, (the wicked instruments of King Henry the Seventh,) by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices, continually harassed the subject, and shamefully enriched the Crown (*g*). The latter of these Acts was soon, indeed, repealed by statute 1 Henry VIII. c. 6; but the court of Star-Chamber continued in high vigour, and daily increasing its authority, for more than a century longer; till finally abolished by statute 16 Car. I. c. 10.

Upon this dissolution, the old common law authority of the court of king's bench, as the *custos morum* of the nation (*h*), being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice (*i*). And it is observable, that in the same Act of Parliament which abolished the Court of Star-Chamber, a conviction by information is expressly reckoned up as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute (*k*). It is true, Sir Matthew Hale, who presided in this court soon after the time of such revival, is said to have been no friend to this method of prosecution (*l*): and if so, the reason of such his dislike was probably the ill use which the master of the Crown Office then made of his authority, by permitting the subject to be harassed with vexatious informations whenever

(*g*) 1 And. 157.

(*h*) See Prynn's case, 5 Mod. 464.

(*i*) Styl. Rep. 217, 245; Styl. Pract. tit. "Information," p. 187, (edit. 1657); Fountain's case, 1 Sid. 152; Dudley's case, 2 Sid. 71.

(*k*) Stat. 16 Car. 1, c. 10, s. 6.

(*l*) Prynn's case, 5 Mod. 460.

[applied to by any malicious or revengeful prosecutor; rather than from any doubt of their legality, or propriety upon urgent occasions (*m*). For the power of filing informations, without any control, then resided in the breast of the master; and, being filed in the name of the Crown, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them in the time preceding the Revolution, occasioned a struggle, soon after the accession of King William, to procure a declaration of their illegality by the judgment of the court of king's bench (*n*). But Sir John Holt, who then presided there, and all the judges, were clearly of opinion that this proceeding was grounded on the common law, and could not be then impeached. And in a few years afterwards a more temperate remedy was applied in parliament, by statute 4 W. & M. c. 18, which enacted, that the clerk of the Crown shall not file any information without express direction from the court of king's bench; and that every prosecutor permitted to promote such information, shall give security by a recognizance of twenty pounds to prosecute the same with effect, and to pay costs to the defendant, in case he be acquitted thereon, unless the judge who tries the information shall certify that there was reasonable cause for filing it; and at all events, to pay costs unless the information shall be tried within a year after issue joined (*o*). But there is a proviso in this Act, that it shall not extend to any other informations than those which are exhibited by the master of the Crown Office, and consequently informations at the suit of the Crown, filed *ex officio* by the attorney-general, are nowise restrained thereby.]

It will be gathered from what has been already stated,

(*m*) 1 Saund. 301; R. *v.* Starling, 1 Sid. 174.

(*n*) M. 1 W. & M., Prynn's case, 5 Mod. 460; Comp. 141; Far. 361; R. *v.* Berchet, 1 Show. 106.

(*o*) As to the costs of a criminal information for libel, see Reg. *v.* Latimer, 20 L. J. (N. S.) Q. B. 129.

that criminal proceedings are, as the general rule, instituted at the instance of a private prosecutor, that is to say, either by the person who has himself been the subject of the offence, or (in the case of misbehaviour punishable by the infliction of a penalty) by some common informer for the sake of money; and it is only occasionally that the Crown interferes directly, and that the alleged offender is prosecuted by the Treasury, and the Attorney-General directed to conduct it. One result of this state of things has been, that offenders have frequently escaped the legal consequences of the crimes they have committed, by reason of there being no one whose duty it is to see that they are properly punished. It is with the hope of preventing this evil in some measure for the future, that the 42 & 43 Vict. c. 22, has been passed (the Prosecution of Offences Act, 1879); by which statute the secretary of state is enabled to appoint an officer, to be called the "director of public prosecutions," whose duty it shall be, under the superintendence of the Attorney-General, to institute, undertake and carry on such criminal proceedings, and to give such advice and assistance to the police and magistracy as shall be prescribed by general regulations made under the Act, and sanctioned by both Houses of Parliament; or (in any special case) such as may be directed by the Attorney-General (*p*). And such general regulations are, in particular, to provide for such director taking action in cases of importance or difficulty; or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, appear to render such action necessary to secure the due prosecution of an offender.

In order to promote the object of the Act, there has been inserted a provision, whereby it is made the duty of every

(*p*) 42 & 43 Vict. c. 22, ss. 2, 8. In connection with this subject it may be noticed that there is now appointed, under the authority of the secretary of state, an officer whose duty it is to superintend and generally to assist the police in their inquiries after crime. He is called the "director of criminal investigations."

clerk to a justice or police court to transmit to such director of public prosecutions a copy of the information, the depositions and other documents connected with any case in which an offence instituted before such justice or court is withdrawn, or not proceeded with in a reasonable time(*p*). And, on the other hand, nothing in the Act contained is to interfere in any way with the right of any person to institute, undertake or carry on any criminal proceeding.

Besides prosecution by way of indictment and information, there formerly existed another, called an *appeal*,—which was at the suit of the subject, not of the Crown, and demanded punishment on account of the private injury rather than the public offence. This proceeding (involving, as we shall see hereafter, a trial by *battle*, instead of by jury,) though leading, in case of conviction, to the same punishment as if the offender had been indicted, might yet be remitted by the private prosecutor; [and probably originated in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offences (*q*): a custom derived to us, in common with other northern nations, from our ancestors, the antient Germans; among whom, according to Tacitus, "*luitur homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus*" (*r*).] Prosecutions by the method of

(*p*) Also, every justice and coroner who shall receive notice from the director of public prosecutions that he has intervened in a criminal proceeding before such justice or coroner, must in like manner transmit to the director such documents connected with the proceeding as he is required by law to deliver to the proper officer of the court in which the case is to be tried; and the duty of delivering them to such officer, thenceforward falls upon the director. (42 & 43 Vict. c. 22, s. 5.)

(*q*) 4 Bl. Com. 313. In our Saxon Laws, particularly those of Athelstan, (Judic. Civ. Lund. Wilk. 71,) we find the several weregilds for homicide established in progressive order, from the death of the ceorl or peasant to that of the king himself. And see the laws of Hen. 1, c. 12.

(*r*) De Mor. Germ. c. 21. And in another place, c. 12: "*Delictis*,

appeal were allowed in cases of murder, larceny, rape, arson and mayhem (*s*). They were not however confined to these cases of private injury, for it was also antiently permitted to any subject to appeal another subject of the crime of high treason, and that either in the courts of common law or in parliament: or, (for treasons committed beyond the seas,) in the court of the high constable and marshal (*t*). But these appeals for treason were, in the opinion of Sir M. Hale, taken away by 5 Edward III. c. 9; 25 Edward III. c. 4; and 1 Henry IV. c. 14 (*u*). And though the remaining appeals continued in force till our own day (*x*), yet by 59 Geo. III. c. 46, it was enacted, that it should thenceforth not be lawful for any person to sue an appeal for treason, murder, felony, or other offence; any law or usage to the contrary notwithstanding (*y*).

pro modo pœnarum, equorum pecorumque numero convicti mulctantur. Pars mulctæ regi vel civitati; pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur." In the same manner, by the Irish Brehon Law, a composition by pecuniary recompence might be made between a murderer and the friends of the deceased. Spenser, St. of Ireland, p. 1513 (edit. Hughes).

(*s*) 4 Bl. Com. p. 314. Of the appeal in case of murder, we may remark, that it might be brought either by the wife for the death of her husband; or by the heir male within four degrees of blood, for the death of his ancestor. (Ibid.)

(*t*) We are informed by Blackstone (ubi sup.), that as late as the year 1631 there was a trial by battle awarded in the court of chivalry, on an appeal of treason beyond the seas. This was the case of Donald Lord Rea *v.* David Ramsey (Rushw. vol. ii. part ii. p. 112).

(*u*) Blackstone (ubi sup.); 1 Hale, P. C. 349.

(*x*) See Abraham Thornton's case, 1 B. & Ald. 405.

(*y*) In the Report of the Criminal Code Bill Commission, it is stated (p. 32) that "a crime having been "committed, there are at present "four entirely different modes of "proceeding against the accused "person: He may be taken before "a magistrate and committed for "trial; he may, except in a few "cases," (as to this, vide sup. p. 361,) "be indicted by a grand jury "without being so committed; he "may in the case of homicide be "committed and tried upon a coro-"ner's inquisition; and in cases of "misdemeanour he may be put upon "his trial by a criminal informa-"tion filed either by the Attorney-"General *ex officio*, or, if the Queen's "Bench Division so orders, by the "master of the crown office at the "instance of a private person in-"jured."

CHAPTER XV.

OF PROCESS: AND HEREIN, OF CERTIORARI.

[WE are now to inquire into the manner of issuing process, after indictment found, to bring in the accused to answer it. We have hitherto supposed the offender to be in custody or else held to bail, before the finding of the indictment; in which cases, he is immediately after the finding, or as soon as convenience permits, to be arraigned thereon. But if he has fled or secretes himself so as to avoid the operation of the warrant; or if no warrant has ever been issued for his arrest, or at least no commitment to take his trial has taken place:—still an indictment may be preferred against him in his absence: since, were he present, he could not be heard before the grand jury against it. And if it be found, then process must issue to bring him into court, to appear or be arraigned. For the indictment cannot be tried unless he appears: according to the rule of justice in all cases, and the express provision of statute 28 Edw. III. c. 3, in capital ones, that no man shall be put to death without being brought to answer by due process of law.]

In general, the process on an indictment is by writ of *capias*, where the person charged is not in custody, and in cases not otherwise provided for by statute (*a*). It is, also, the practice upon an indictment found during the assizes or sessions, to issue a *bench warrant*, to apprehend the defendant (*b*). And in certain cases, we have already

(*a*) 25 Edw. 3, st. 5, c. 14; 2 Hale, P. C. 195; R. v. Yandell, 4 T. R. 521; 1 Chit. Cr. 440.

(*b*) 1 Chit. Cr. L. pp. 36, 339.

seen, that a person against whom an indictment has been found or information filed for a misdemeanor, may be apprehended and held to bail by a warrant from a judge of the Queen's Bench division of the High Court of Justice under the provisions of 48 Geo. III. c. 58, s. 1 (*c*). But process on indictment found, may also, under the provisions of a later statute, be by a *justice's* warrant, instead of suing out a *capias*, or bench warrant, or proceeding under the Act of Geo. III. For by 11 & 12 Vict. c. 42, s. 3, it is enacted, that where an indictment shall have been found in any court of oyer and terminer, general gaol delivery, or general or quarter sessions of the peace, against any person then at large,—a certificate of the fact shall be granted by the proper officer to the prosecutor; and upon production thereof to any justice of the peace for the place where the offence is alleged in the indictment to have been committed, or in which the person indicted is or is suspected to be, the justice shall issue a warrant to apprehend such person, and cause him to be brought up to be dealt with according to law: and, upon its being proved that he is the person named in the indictment, shall, without further inquiry, commit him for trial, or admit him to bail (*d*). On the other hand, if the person against whom the indictment is found, shall be in prison for any other offence,—then, upon proof thereof, the justice shall issue his warrant to the gaoler, commanding him to detain such prisoner in custody, until by writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the indictment, or until he shall be otherwise discharged by due course of law (*e*).

(*c*) Vide sup. p. 341.

(*d*) See the Report of the Criminal Code Bill Commission (p. 32), cited sup. p. 360, n. (*r*).

(*e*) In the particular case of a prisoner, ordered by the Queen's Bench Division to be tried at the Central Criminal Court, under 19 & 20 Vict. c. 16, he is to be removed, for the purposes of the trial, without *habeas corpus* or other writ. And so also by 30 & 31 Vict. c. 35, s. 10, where an indictment is found against one who has been held to bail, and he shall be then in the prison belonging to the jurisdiction of the court

Supposing, however, the defendant not to be found, so that his apprehension cannot be effected by any of the above means,—he is then liable, on his non-appearance to the indictment, to be *outlawed* (*f*).

The first process for this purpose in cases of treason or felony is a writ of *capias* (*g*); but in misdemeanors the process is less summary: for here there is, in the first place, a writ of *venire facias*, which is in the nature of a summons, to cause the party to appear; and if, by the return to such *venire*, it appears that the party hath lands in the county whereby he may be distrained, then a distress infinite shall be issued from time to time till he appears. But if the sheriff returns that he has no lands in his bailiwick, then, upon his non-appearance, a writ of *capias* shall issue, which commands the sheriff to take his body and have him at the next assizes; and if he cannot be taken upon the first, a second and a third shall issue, called an *alias* and a *pluries capias* (*h*). And after the proper writs have issued without any effect, the offender shall be put in the *exigent*, in order to his outlawry; [that is, he shall be exacted (proclaimed, or required to surrender), at five successive county courts (*i*); and a writ of proclamation shall also be issued; and if he be returned *quinto exactas*, and does not appear at

under warrant of commitment or sentence for some other offence, the court may, by order in writing, direct the governor of such prison to bring him up to be arraigned, without a *habeas*.

(*f*) See the remarks on outlawry contained in the Report of the Criminal Code Bill Commission (p. 36), where it is observed that the process, though not as yet formally abolished in criminal cases, "has "become practically obsolete, and "in these times in which extradi- "tion treaties have been very gene- "rally adopted, it is likely to be of "less use than formerly." It may be observed here that outlawry (which in *civil* cases has now been abolished by 42 & 43 Vict. c. 59) does not lie against a peer, except for treason, felony, or breach of the peace; nor, in any case, against an infant under fourteen. (See 1 Chit. Cr. L. 348.) In case of outlawry of a woman, she is technically said to be *waived*.

(*g*) 4 Bl. Com. p. 319.

(*h*) Bl. Com. ubi sup.

(*i*) The county courts to which Blackstone here refers, are those which used to be held before the *sheriff*, as to which vide sup. bk. v. ch. iv.

[the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law: so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise, and his property is forfeited to the Crown (*j*). And outlawry for treason or felony amounts to a conviction of the offence, as much as if the offender had been found guilty by his country (*k*). His life is, however, still under the protection of the law, so that though antiently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head, like a wolf, by any one that should meet him (*l*);—because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him;—yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder (*m*), unless it happens in the endeavour to apprehend him (*n*): for any person may arrest an outlaw on a criminal prosecution,—either of his own head, or by writ or warrant of *capias utlagatum*,—in order to bring him in to be dealt with according to law.] It is further to be observed, that in order to take proceedings to *reverse* an outlawry on the ground of error or otherwise (*o*), it is necessary that, in the case of treason or felony, the defendant must first render himself into custody (*p*); whereupon he may then take objection to the regularity of the

(*j*) It may be noticed here, that nothing in the Felony Act, 1870 (33 & 34 Vict. c. 23), whereby forfeiture is abolished as a consequence of a conviction for treason or felony, "shall affect the law of forfeiture consequent upon outlawry." (Sect. 1.)

(*k*) 4 Bl. Com. p. 319; 2 Hale, P. C. 205.

(*l*) Mirr. c. 4, s. 4; Co. Lit. 128.

(*m*) 1 Hale, P. C. 497.

(*n*) Bracton, l. 3, tr. 3, c. 11.

(*o*) Although seldom resorted to, still the law of outlawry has occasionally come under the notice of the courts, even in modern times. Thus in the year 1845 an outlawry was reversed after the lapse of 116 years, for want of due proclamations having been made at the time. (See Tynte *v.* Reginam, 7 Q. B. 216.)

(*p*) See Solomon *v.* Graham, 5 Ell. & Bl. 320.

process; and such objection, if allowed, will have the effect of reversing the outlawry and setting aside the forfeiture, and will enable the party accused to plead and defend himself against the indictment (*q*). In one instance, indeed, though the outlawry be regular, its consequences may still be avoided: for by 5 & 6 Edw. VI. c. 11, (which permits outlawry for treason to be awarded against persons residing abroad,)—if a person so outlawed shall, within one year, yield himself to the chief justice, and offer to traverse the indictment, he shall be admitted so to do; and, being acquitted of the indictment, shall be discharged of the outlawry.

[Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that writs of *certiorari facias* are usually had, though they may also be had at any time before trial;—or, as it seems, at any time before judgment is given, and even afterwards, where error does not lie (*r*);—to certify, and remove the indictment, with all the proceedings thereon], from any inferior court, into the Queen's Bench division of the High Court of Justice. [For this is the sovereign's ordinary court of justice in causes criminal; and has consequently the power of issuing such writ to any court of rank subordinate to its own in causes of this description, unless the *certiorari* be taken away by the express words of some Act of Parliament. A *certiorari* removing the proceedings into such court is commonly granted for one of these four purposes: either, 1, to consider and determine the validity of an indictment, and the proceedings thereon, and to quash or confirm them as there is cause; 2, (where it is surmised that a partial or insufficient trial will probably be had in the court below,) in order to have the person against whom it is found, tried *at bar*, or else before the justices of *nisi prius*, according to the

(*q*) See Chit. Cr. L. 368, 369; 4 Bl. Com. 320; Tynte *v.* Reginam, 7 Q. B. 216.

(*r*) 1 Chit. Cr. L. 380.

[course of a civil action (*s*); 3, in order to plead the royal pardon in the Queen's Bench: or, 4, in order to issue process of outlawry against the offender, in places where the process of the inferior court will not reach him (*t*). Such writ of *certiorari*, when issued and delivered to the inferior court, for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court; and makes all subsequent proceedings therein entirely erroneous and illegal, unless indeed the record is remanded to the court below, to be there tried and determined. A *certiorari* may be granted at the instance of either the prosecutor or the defendant; and the former was once entitled to demand it as a matter of right, though the application of the latter has always been dependent on the discretion of the court (*u*).] But now, under 5 & 6 Will. IV. c. 33, and 16 & 17 Vict. c. 30, s. 5, no *certiorari* shall issue at the instance of the prosecutor, or of any other person (except the attorney-general), without motion first made in the Queen's Bench division, or before some judge thereof, and leave obtained in the same manner as where application is made on the part of the defendant: and moreover, before the allowance of any writ of *certiorari*, the party on whose behalf it is applied for, must enter into a recognizance before a judge of such division or before a justice of the peace, in such sum and with such sureties as the court or judge may direct, and with such conditions as are contained in the previous statutes 5 & 6 W. & M. c. 11, and 8 & 9 Will. III. c. 33, passed in relation to the same subject (*x*). And by 16 & 17 Vict c. 30, s. 4, it

(*s*) 14 Hen. 6, c. 1; 6 Hen. 8, c. 6; 4 Rep. 43; 2 Hale, P. C. 41. Et vide sup. p. 301.

(*t*) 2 Hale, P. C. 210.

(*u*) 4 Bl. Com. 321. In the exercise of this discretion, a *certiorari* has been seldom granted at the instance of the defendant, to remove indictments from the justices of gaol delivery. (See Hawk. P. C. b. 2, c. 27, s. 27; R. *v.* Gwynne, Burr. 749; R. *v.* Kingston, Cowp. 283; R. *v.* Harrison, 1 Chit. Rep. 571.)

(*x*) By 5 & 6 Will. 4, c. 33, a recognizance was required only where

is enacted, that no indictments, except against bodies corporate not authorized to appear by attorney in the court in which the indictment is preferred, shall be removed into the Queen's Bench Division, or into the Central Criminal Court, either at the instance of the prosecutor or of the defendant (other than the attorney-general acting on behalf of the Crown,)—unless it be made to appear to the court that a fair and impartial trial of the case cannot be had in the court below; or that some question of law of more than usual difficulty and importance is likely to arise upon the trial; or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for the satisfactory trial of the same.

Another Act (19 & 20 Vict. c. 16) contains provisions, of which some notice is proper in this place, with regard to the trial of offences, the indictment for which has been removed by *certiorari* into the Queen's Bench Division. 1. Whenever any indictment or inquisition has been so removed in the case of some felony or misdemeanor alleged to have been committed in a place *out of the jurisdiction* of the Central Criminal Court, the Queen's Bench Division (or a judge thereof in vacation) is empowered to order the trial thereof to be there tried nevertheless,—provided it shall appear expedient to the ends of justice that such course should be taken (*y*). 2. Wherever any person shall have been committed or held to bail for any such felony or misdemeanor, the same Division, or a judge thereof in vacation, if it shall appear expedient that the person charged shall

the writ was obtained on the part of the defendant. But by 16 & 17 Vict. c. 30, s. 5, it is also required from the prosecutor; and this last statute provides, moreover, for the payment of the costs incurred subsequent to the removal, either by the defendant or the prosecutor, according to the ultimate issue of the proceedings. (See The Queen *v.* Oastler, Law Rep., 9 Q. B. 132.) As to the terms on which a *certiorari* will be granted, see The Queen *v.* Jewell, 7 Ell. & Bl. 140. No recognizance on removal is required from the prosecutor, in the case of an indictment found at quarter sessions against a *corporation*. (See The Queen *v.* Manchester, 7 Ell. & Bl. 463.)

(*y*) 19 & 20 Vict. c. 16, s. 1.

be tried at the Central Criminal Court, may make an order to that effect: and thereupon a writ of *certiorari* shall be issued to the justices of oyer and terminer, or of the peace, or coroner, as the case may require, commanding them to certify and return to that court any indictment or inquisition which is then pending or shall thereafter be found against such person . . 3. Wherever a *certiorari* shall be delivered to any court for the purpose of removing an indictment or inquisition therefrom, a person charged thereby who shall then be in prison, shall not be discharged by such court, but shall remain there till discharged by due course of law (*a*).

[It is at this stage of the proceeding also—viz., after indictment found, and before arraignment—that indictments found by the grand jury against a peer must, in consequence of a writ of *certiorari*, be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain (*b*). And also, that in places of exclusive jurisdiction, as the two universities, indictments must be delivered up, on challenge and claim of cognizance, to the courts therein established by charter, and confirmed by Act of Parliament, to be therein respectively tried and determined (*c*).]

(*z*) 19 & 20 Vict. c. 16, s. 3.

(*a*) Sect. 11. See sects. 8, 9, 10, as to the recognizances required, (in cases of orders made, or writs of *certiorari* issued under this Act,) from the person charged, or the prosecutor, or witnesses, to take their trial, prosecute or give evidence, (as the case may require,) at the Central Criminal Court.

(*b*) Vide sup. pp. 296, 297.

(*c*) Vide sup. p. 321.

CHAPTER XVI.

OF ARRAIGNMENT AND ITS INCIDENTS.

WHEN a person against whom a true bill of indictment is found appears voluntarily to plead thereto, or is brought up in custody to answer it, he is immediately to be *arraigned;* which is the next stage of criminal prosecution (*d*).

[To arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment (*e*). The prisoner is to be called to the bar by his name; and it is laid down in our antient books (*f*), that, even under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds: unless there be evident

(*d*) Vide sup. p. 340. In *misdemeanors*, the trial of a defendant after he has once appeared (which appearance, in case of an indictment at the sessions or assizes, must be *in person*) may take place in his absence. (See 4 Bl. Com. 375; 1 Chit. Cr. L. 411; The Queen *v.* Birmingham and Gloucester Rail. Co., 3 Q. B. 233.) And by 19 & 20 Vict. c. 16, s. 6, it is provided that on application to the Queen's Bench Division, or a judge thereof, for an order, that a person charged with an offence alleged to have been committed out of the jurisdiction of the Central Criminal Court, shall nevertheless be there tried,—it shall not be necessary for the accused to be brought or appear in *person* before such Division or judge.

(*e*) This word in Latin (says Sir M. Hale, vol. ii. p. 216) is no other than *ad rationem ponere*, (and in French *ad reson*, or abbreviated *a resn*,) that is, "to call to account."

(*f*) Bract. l. 3, De Coron. c. 18, s. 3; Mirr. c. 5, ss. 1, 54; Flet. l. 1, c. 31, s. 1; Brit. c. 5; Staundf. P. C. 78; 3 Inst. 34; Kel. 10; 2 Hale, P. C. 219; Hawk. P. C. b. 2, c. 28, s. 1.

[danger of any escape, and then he may be secured with irons. But yet in Layer's case, A.D. 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains, during the time of his arraignment (*f*).

On a charge of treason or felony, when the prisoner is brought to the bar, he is called upon by name to hold up his hand (*g*); which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de personâ;* and he owns himself to be of that name by which he is called (*h*). However, it is not an indispensable ceremony; for being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well; therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient (*i*).

Then the indictment is to be read to him distinctly in the English tongne; which was law even while all other proceedings were in Latin; that he may fully understand his charge. After which, it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty.

When a criminal is arraigned he either *stands mute* or *confesses the fact* (which circumstances we may call *incidents* to the arraignment), or else he *pleads* to the indictment; which is to be considered as the next stage of the

(*f*) State Tr. iv. 230. And see Hawk. P. C. b. 2, c. 28, s. 1, n. (2); Waite's case, 1 Leach, C. C. 36.

(*g*) By 19 & 20 Vict. c. 16, s. 7, it is provided, that whenever any indictment or inquisition shall have been transmitted or removed to the Central Criminal Court under the provisions of that Act, the person charged shall be thereon arraigned in the same manner in all respects, as if the offence had been committed within the jurisdiction of that court, and the indictment or inquisition had been originally returned there.

(*h*) 2 Hale, P. C. 219.

(*i*) R. *v.* Ratcliffe, 1 W. Bl. Rep. 3.

[proceedings. But, first, let us observe these incidents to the arraignment—of standing mute, or confession.]

I. Regularly a prisoner is said to stand mute when, being arraigned for treason or felony, he either, 1, makes no answer at all; or, 2, answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise (*j*). In the first case the rule of the antient law was, that a jury was to be impanelled to inquire whether the prisoner stood obstinately mute, or was dumb *ex visitatione Dei*. If the latter appeared to be the case, the judges were to proceed to the trial, and examine all points as if he had pleaded not guilty (*k*). But if found to be obstinately mute, then, in treason, (and also in all misdemeanors, and in petty larcenies,) it was held that standing mute was equivalent to conviction. [But upon indictment for any other felony, the prisoner, after *trina admonitio*, and a respite of a few hours, was subject to the barbarous sentence of *peine forte et dure* (*l*); viz. to be remanded to prison and put into a low dark chamber, and there laid on

(*j*) He was also formerly considered as standing mute, if, upon pleading not guilty, he at the same time refused *to put himself upon the country*, that is, refer the matter to trial by jury. (2 Hale, P. C. 316; 4 Bl. Com. 324, 340.) But now, by statute 7 & 8 Geo. 4, c. 28, s. 1, he shall by the plea of not guilty, without any further form, be deemed to have put himself upon his country, for trial.

(*k*) 4 Bl. Com. 324; Hawk. P. C. b. 2, c. 30, s. 7.

(*l*) Blackstone (vol. iv. p. 327) remarks on this punishment, that it has been doubted whether it subsisted at the common law, or was introduced in consequence of the statute Westminster the first. He inclines to this latter opinion, and cites 2 Inst. 179; 2 Hale, P. C. 322; Hawk. P. C. b. 2, c. 30, s. 16; Staundf. P. C. 149; Barr. 82; Emlyn on 2 Hale, P. C. 322, and Year Book, 8 Hen. 4, c. 2. By these two last authorities, it would appear that at common law, the standing mute in *felony* (as well as in treason and misdemeanors) was a confession of the charge. As to *peine forte et dure*, much information will be found in Reeves's Hist. Eng. L. vol. ii. p. 134; vol. iii. pp. 133, 250, 418. That author thinks it was introduced sometime between the fifth year of Henry the third, and the third year of Edward the first.

[his back on the bare floor naked, unless where decency forbade; that there should be placed upon his body as great a weight of iron as he could bear, and more: that he should have no sustenance, save only on the first day three morsels of the worst bread, and on the second day three draughts of standing water that should be nearest to the prison door; and that in this situation such should be alternately his daily diet, *till he died;* or, as antiently the judgment ran, *till he answered* (*m*).]

Afterwards, however, it was provided by 12 Geo. III. c. 20, that standing mute in felonies, also, should be equivalent to a conviction: and now by 7 & 8 Geo. IV. c. 28, s. 2, it is enacted, that if any person, being arraigned upon, or charged with, any indictment or information for treason,

(*m*) 4 Bl. Com. 327; Britt. cc. 4 and 22; Flet. l. 1, c. 34, s. 33; Hawk. P. C. b. 2, c. 30, s. 16. Blackstone (vol. iv. p. 326) remarks upon this strange proceeding, that it is a practice of a different nature from the *rack*, or *question*, to extort a confession from criminals,—*this* having been only used to compel a man to put himself upon his trial, *that* being a species of trial itself. As to the rack, he says that "it is "utterly unknown to the law of "England; though once, when the "Dukes of Exeter and Suffolk, and "other ministers of Henry the "sixth, had laid a design to intro-"duce the civil law into this king-"dom as the rule of government; "for the beginning thereof, they "erected a rack for torture; which "was called in derision the Duke "of Exeter's Daughter, and still "remains in the Tower of London, "(3 Inst. 35,) where it was occa-"sionally used as an engine of "state, not of law, more than once "in the reign of Queen Elizabeth. "But when upon the assassination "of Villiers, Duke of Buckingham, "by Felton, it was proposed, in "the Privy Council to put the "assassin to the rack, in order to "discover his accomplices, the "judges (being consulted) declared "unanimously, to their own honour "and the honour of the English "law, that no such proceeding "was allowable by the laws of "England." Mr. Hallam observes, that though it be most certain that the English law never recognized the use of torture, yet there were many instances of its employment in the reigns of Elizabeth and James; and, among others, in the case of the Gunpowder Plot. He says, indeed, that in the latter part of the reign of Elizabeth, "the rack seldom "stood idle in the Tower;" and cites Lingard, (note U,) for a specification of the different kinds of torture used. (Hall. Const. Hist. vol. i. p. 201; vol. ii. p. 11.)

felony, piracy or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information (*n*);—in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same force and effect, as if such person had actually pleaded the same (*o*). When there is reason to doubt, however, whether the prisoner is sane, a jury should be charged to inquire whether he is sane or not; which jury may consist of any twelve persons who may happen to be present (*p*); and upon this issue, the question will be whether he has intellect enough to plead, and to comprehend the course of the proceedings. If they find the affirmative, the plea of not guilty may be entered, and the trial will proceed (*q*); but if the negative, the provision of 39 & 40 Geo. III. c. 94, s. 2, is then applicable; by which it is enacted, that insane persons indicted for any offence, and on their arraignment found to be insane by a jury lawfully impanelled for that purpose, so that they cannot be tried upon the indictment, — shall be ordered by the court to be kept in strict custody till the royal pleasure be known (*r*).

(*n*) In the case where the prisoner is deaf and dumb, he may be communicated with by signs, or the indictment may be shown to him, with the usual questions written on paper. (See Jones's case, 1 Leach, 120; Thompson's case, 2 Lewin, 137; R. *v.* Dyson, 7 Car. & P. 306; 1 Chit. Cr. L. 417.)

(*o*) This course was taken in R. *v.* Bitton, 6 Car. & P. 306.

(*p*) 1 Chit. Cr. L. 424.

(*q*) There have been several instances in which persons found to be mute by the visitation of God, have been tried, and had sentence passed upon them. (See Jones's case, ubi sup.; Steel's case, 2 Leach, 507.) But in Blackstone's time it was a point yet undetermined whether judgment of death could be given against a prisoner who had never pleaded, and could say nothing in arrest of judgment. (4 Bl. Com. 325; 2 Hale, P. C. 317. And see Mr. Christian's notes to Blackstone, ubi sup.)

(*r*) Vide sup. p. 26. In several cases the course taken, when the prisoner has stood mute, has been to put *three* points to the jury; first, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or

II. The other incident to arraignment, to which we have referred, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, at least in capital cases, out of tenderness of the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment (*s*).

[But there is another species of confession, which we read much of in our antient books, of a far more complicated kind, which is called *approvement;* and that was, when a person, indicted of treason or felony, and arraigned for the same, did confess the fact before plea pleaded, and appeal or accuse others, his accomplices, of the same crime, in order to obtain his pardon. In this case he was called an *approver*, or prover, *probator;* and the party appealed, or accused, was called the *appellee*. Such approvement could only be, in capital offences; and it was, as it were, equivalent to an indictment, since the appellee was equally called upon to answer it; and if he had no reasonable and legal exceptions to make to the person of the approver,—which indeed were very numerous,—he was obliged to put himself on his trial by the country: and, if found guilty, suffered the judgment of the law; and the approver had his pardon *ex debito justitiæ*. On the other hand, if the appellee were acquitted by the jury, the approver received judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon failed, viz. the conviction of some other person; and therefore his conviction remained absolute.

But it was purely in the discretion of the court, to permit the approver thus to appeal or not; and, in fact,

not; thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings. (See R. v. Dyson, 7 Car. & P. 305; R. v. Pritchard, ib. 303; The Queen v. Berry, Law Rep., 1 Q. B. D. 447.)

(*s*) 4 Bl. Com. p. 329, 2 Hale, P. C. 225.

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[this course of admitting approvements hath been long disused; for the truth is, as Sir Matthew Hale observes, that more mischief arose to good men by these kinds of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders; and, therefore, in the times when such appeals were admitted, great strictness and nicety were held therein (*t*).]

It has also been usual for the justices of the peace, by whom persons charged with felony are committed to gaol,—in cases where it has appeared probable that the evidence would otherwise be insufficient to obtain a conviction,—to hold out a hope to some one of the accomplices, that if he will fairly disclose the whole truth as a witness on the trial, and bring the other offenders to justice, he shall himself escape punishment. Such an accomplice is usually said to be admitted to become *queen's evidence;* but his admission in that capacity, requires the subsequent sanction of the judges of gaol delivery (*u*). Nor will a person in general be admitted as queen's evidence, if it appear that he is charged with any other felony than that in question (*x*). The testimony of an accomplice is in all cases, indeed, regarded with just suspicion (*y*); and unless this statement be corroborated in some material part by unimpeachable evidence, the jury are usually advised by the judge to acquit the prisoner notwithstanding (*z*). More-

(*t*) See 2 Hale, P. C. c. 29; Hawk. P. C. b. 2, c. 24.

(*u*) See R. *v.* Rudd, Cowp. 331.

(*x*) 2 C. & P. 411. See R. *v.* Lee, R. & R.C. C. R. 361; R. *v.* Brunton, ib. 454.

(*y*) On this subject see the remarks of Holt, C. J., in Charnock's case, 4 St. Tr. 494.

(*z*) 1 Phil. Ev. 9th edit. 31; Taylor on Evidence, p. 779, 2nd edit. And as to the nature of the confirmation required, see R. *v.* Addis, 6 C. & P. 388; R. *v.* Webb, ib. 595; R. *v.* Moores, 7 C. & P. 270; R. *v.* Wilkes, ib. 272; Despard's case, 28 How. St. Tr. 488. It is held, however, that the jury may legally convict if they think fit, on the unsupported testimony of an accomplice. (1 Phil. Ev. 30; R. *v.* Hastings, 7 C. & P. 152; Taylor on Evidence, p. 779, 2nd edit.; R. *v.* Stubbs, 1 Dearsley's C. C. R. 555.)

over, if a felon, after having confessed the crime and being admitted as queen's evidence, fails in the condition on which he was so received, and refuses to give the jury, on the trial of his accomplice, such fair and full information as shall be in his knowledge, he is then himself liable to be tried for the offence, and may be convicted on his own confession (*a*).

(*a*) 1 Phil. Ev. 29. Accordingly upon a trial at York before Mr. Justice Buller, the accomplice denied in his evidence all that he had before confessed; upon which the prisoner was acquitted. But the judge ordered an indictment to be preferred against the accomplice for the same crime; and on his previous confession, and other circumstances, he was convicted and executed. (4 Bl. Com. by Christian, p. 331, *in notis*.)

CHAPTER XVII.

OF PLEA AND ISSUE.

[WE are now to consider the plea of the prisoner, or defendant; that is, the defensive matter alleged by him on his arraignment, if he does not confess or stand mute (*a*). This is either—

I. A plea to the jurisdiction.
II. A demurrer (*b*).
III. A plea in abatement.
IV. A special plea in bar: or
V. The general issue (*c*).

(*a*) Vide sup. p. 388. By 19 & 20 Vict. c. 16, s. 6, it is provided, that if the Queen's Bench Division shall grant an application that a person charged with an offence alleged to have been committed out of the jurisdiction of the Central Criminal Court, shall nevertheless be tried in such court,—it shall not be necessary for the accused afterwards to plead to the indictment or inquisition in such Division.

(*b*) See Bl. Com. vol. iv. p. 332. It has not been thought convenient to alter this arrangement of Blackstone's; but, in strictness, a *demurrer* is not a *plea*. It is rather an exception taken to the indictment or information in point of law, as a reason why the defendant should not be compelled to plead to its allegations.

(*c*) Besides these pleas, there were formerly the *declinatory* pleas of *sanctuary* and of *benefit of clergy*. (See 2 Hale, P. C. 236.) As to the former, we may remark, that the law of sanctuary was introduced, and continued, during the superstitious veneration paid to consecrated ground in the time of popery; and that it existed in England from a period soon after the conversion of the Saxons to Christianity. (See Reeves's Hist. Eng. Law, vol. i. p. 19; vol. iii. p. 137; vol. iv. pp. 182, 314, 320.) The statement of the law on this subject by Black-

[I. A plea to the jurisdiction, is where an indictment is taken before a court that hath no cognizance of the offence (*d*): as if a man be indicted for treason at the quarter sessions (*e*). In such or in similar cases, he may except to the jurisdiction of the court, without answering

stone (vol. iv. p. 332) is as follows:—"If a person accused of any "crime, except treason and sacri- "lege, had fled to any church or "churchyard, and, within forty "days after, went in sack-cloth "and confessed himself guilty be- "fore the coroner; and declared "all the particular circumstances "of the offence, and took the oath "in that case provided, viz. that "he abjured the realm, and would "depart from thence forthwith at "the port which should be as- "signed him, and would never "return without leave from the "king, he by this means saved his "life; provided he observed the "conditions of the oath, by going "with a cross in his hand, and "with all convenient speed, to the "port assigned, and embarking. "For if during this forty days' "privilege of sanctuary, or on his "road to the sea side, he was ap- "prehended and arraigned in any "court for this felony, he might "plead the privilege of sanctuary, "and had a right to be remanded "if taken out against his will."—(Mirr. c. 1, s. 13; Hawk. P. C. b. 2, c. 32.) But by this abjuration his blood was attainted, and he forfeited all his goods and chattels. (Hawk. P. C. b. 2, c. 9, s. 44.) However, the immunity of these sanctuaries,—which consisted not only of churches and churchyards, but of certain other places in various parts of this kingdom, viz. in Westminster, Wells, Norwich, York, &c.—became very much abridged by the statutes 26 Hen. 8, c. 13; 27 Hen. 8, c. 19, and 39 Hen. 8, c. 12. And by the statute 21 Jac. 1, c. 28, all privilege of sanctuary, and abjuration consequent thereupon, was utterly taken away and abolished. And the opposing of any process in pretended privileged places was (by later statutes) made a felonious offence. Vide sup. p. 263.

As to *benefit of clergy*, vide post, chap. XIX. We shall only remark here, that though it might be the subject of a plea, it was not usually brought forward in that shape, but in arrest of judgment.

(*d*) By 19 & 20 Vict. c. 16, s. 7, wherever any indictment or inquisition shall have been transmitted or removed to the Central Criminal Court, under the provisions of that Act,—any person charged with any offence thereby shall plead to such indictment or inquisition, and shall be tried in such court; in the same manner in all respects as if such offence had been actually committed within its jurisdiction, and the indictment or inquisition had been originally there presented or returned. See also 25 & 26 Vict. c. 65, s. 7.

(*e*) Vide sup. p. 313.

[at all to the crime alleged (*f*).] But a formal plea to the jurisdiction is of rare occurrence; it being competent to a defendant to bring forward this sort of objection, in some cases by way of demurrer, or by motion in arrest of judgment; in others under the general issue (*g*).

II. A demurrer. This arises when the facts as alleged in the indictment or information are allowed to be true, but the person accused takes exception to the sufficiency of the charge on the face of it: as if he insists that the facts stated are no felony, treason, or whatever the crime is alleged to be. Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound: which is an animal not the subject of larceny at common law (*h*), and the stealing whereof is not made felony by any statute, but only a misdemeanor;—in this case, the party indicted may demur to the indictment, denying it to be felony, though he confesses the act of taking the animal. If on demurrer to an indictment for matter of substance the point of law be adjudged *for* the defendant, the judgment is that he be dismissed and discharged (*i*). On the other hand, if the judgment be *against* the defendant, such judgment for the crown is final (*k*); though it has been thought by some that he should be allowed to plead over the general issue "not guilty;" and, in some cases, he has been allowed to demur and to plead not guilty at the same time (*l*). But, owing chiefly to the power which the defendant has of urging substantial objections to the indictment upon the general issue of "not guilty," or by motion in arrest of judg-

(*f*) 2 Hale, P. C. 256.

(*g*) R. *v.* Fearnley, 1 T. R. 316; R. *v.* Johnson, 6 East, 583.

(*h*) Vide sup. p. 120.

(*i*) 1 Chit. Cr. L. 443, 444; Andr. 147.

(*k*) See Hawk. P. C. b. 2, c. 31, s. 7; Bro. *Peremptory*, 86; 3 Staundf. 150, C.; 2 Inst. 178; 2 Hale, P. C. 257; Reg. *v.* Faderman, 1 Den. C. C. 569.

(*l*) See R. *v.* Phelps, 1 C. & M. 181; R. *v.* Adams, ib. 299; R. *v.* Purchase, ib. 617.

ment, demurrers have been seldom used (*n*). Yet, objections at this early stage are not unfrequently taken in another and more summary shape, viz., by a motion on the part of the prisoner to *quash* the indictment (*o*); a course which, in a very clear and obvious case, the practice of the courts allows (*p*). And the power of bringing forward objections to the indictment at any later period, is materially limited by 14 & 15 Vict. c. 100 (*q*); which provides that all objections for *formal* defects shall be taken by demurrer or motion to quash the indictment, and not afterwards; while, by the same enactment it is directed that if upon such demurrer or motion, any merely formal defect shall be established to exist, it shall be amendable forthwith by order of the court.

III. A plea in abatement, or dilatory plea, is founded on some matter of fact extraneous to the indictment, tending to show that it is defective in point of form; and such plea has principally occurred in the case of a *misnomer;* i. e. a wrong name, or a false addition to the defendant,—as where James Allen, gentleman, has been indicted by the name of John Allen, esquire, and has pleaded that he has the name of James and not of John, and that he is a gentleman and not an esquire. But in the case of misnomer, no advantage at all now accrues to the defendant by a plea in abatement; for by 7 Geo. IV. c. 64, s. 19, no indictment or information shall be abated by reason of any

(*n*) It is, however, to be remarked that an objection which would be sufficient on demurrer, if not so taken is, in some cases, *aided* (that is cured) by an adverse verdict. See as to this, Heymann *v.* The Queen, Law Rep., 8 Q. B. 102; R. *v.* Goldsmith, ib. 2 C. C. R. 74; Bradlaugh *v.* The Queen, ib. 3 Q. B. D. 607.

(*o*) The court may also quash the indictment on its own view. (See R. *v.* Wilson, 6 Q. B. 620; R. *v.* Dunn, Ry. & M. P. C. 146.) And the motion to quash may be made after plea pleaded. (The Queen *v.* Heane, 4 B. & Smith, 947.)

(*p*) 1 Chit. Cr. L. 299.

(*q*) 14 & 15 Vict. c. 100, ss. 24, 25. And see 7 Geo. 4, c. 64, s. 20.

dilatory plea of misnomer: but if the court shall be satisfied, by affidavit or otherwise, of the truth of such plea, it shall forthwith cause the indictment or information to be amended according to the truth; and shall call upon the party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded. And by 14 & 15 Vict. c. 100, s. 24, no indictment shall be held insufficient for want of, or imperfection in, the addition of any defendant. Let us therefore next consider a more substantial kind of plea, viz.

IV. A special plea in bar; which goes to the merits of the indictment, and gives a reason why the prisoner ought to be discharged from the prosecution. These are principally of four kinds (*r*). A former acquittal; a former conviction; a former attainder; or a pardon.

1. [The plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy more than once, for the same offence (*s*): and hence it is allowed as a consequence, that when a man is once fairly found not guilty upon an indictment or other prosecution, before any court having a competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime (*t*).] This however applies only to an acquittal by verdict of a petty jury (*u*): and therefore if a man be committed to take his

(*r*) In the particular case where a parish is indicted for not repairing a road, or a county for not repairing a bridge, another kind of special plea in bar occurs; for the parish or county may respectively plead, in discharge of their presumptive liability, that some other party is liable to a special obligation to repair.

(*s*) "Jeopardy *of his life*," is the expression of Blackstone (vol. iv. p. 335). The maxim, however, is not confined to capital felonies, and extends even to misdemeanors. See an instance of *autrefois acquit* pleaded in a case of misdemeanor, R. *v.* Taylor, 3 B. & C. 502.

(*t*) See Beak *v.* Thyrwhit, 3 Mod. 194; Hawk. P. C. b. 2, c. 35, s. 10.

(*u*) 2 Hale, P. C. 243, 246;

trial for a crime at some particular assizes or sessions whereat no bill is preferred against him, he is still liable to be indicted at a subsequent assizes or sessions, for the same crime; and if the bill against him be thrown out by the grand jury, or if the petty jury having him in charge be discharged by the judge before verdict (*x*), he is in either case liable to be indicted again (*y*). The doctrine applies, also, only to the case where the first indictment was not substantially erroneous. For if it were, the former prosecution is no bar, because the defendant was never legally in jeopardy (*z*). It is also to be observed, that, in general, the crime of which the defendant was before acquitted must be identical with that with which he now stands charged: but upon this point, distinctions of much nicety arise. Thus if a man be acquitted upon an indictment of murder, he may not only plead *autrefois acquit* to a subsequent indictment for the murder, but even to an indictment for the manslaughter of the same person; or *è converso*, if he be indicted for manslaughter, and be acquitted, he shall not be indicted for the same death, as murder; for the two cases differ only in the degree of guilt, and the fact of felonious homicide is the same (*a*). So if he be indicted for a murder, as having been committed on a certain day, and be afterwards indicted again for the murder of the same person on a different day, he may plead *autrefois acquit*, and aver it to be the same felony; for the day is not material (*b*). On

Hawk. P. C. b. 2, c. 35, s. 6. See The Queen *v.* Charlesworth, 1 B. & S. 507.

(*x*) See Winsor *v.* The Queen, Law Rep., 1 Q. B. 289.

(*y*) 1 Chit. Cr. L. 458; 2 Hale, P. C. ubi supra. But the grand jury cannot, after throwing out the bill, find another bill against him for the same offence, at the *same* assizes or sessions. (R. *v.* Humphreys, Carr. & M. 601; R. *v.* Austin, 4 Cox, C. C. 386.)

(*z*) 4 Rep. 45, a; 2 Hale, P. C. 393. See The Queen *v.* Green, 26 L. J. (M. C.) 17.

(*a*) 2 Hale, P. C. 246.

(*b*) 2 Hale, P. C. 244. Hale adds, "Besides the death is of a

the other hand, if a man be indicted as accessory, and acquitted, that acquittal will be no bar to an indictment as principal, nor *è converso*. It was formerly doubted, indeed, whether he might not plead an acquittal as principal, to a second indictment charging him as accessory before the fact; but the general doctrine is now held to apply to that case also (*c*). For though the offence may in some respects be considered as the same, the prisoner may be convicted under the second indictment, upon facts which would not have warranted his conviction under the first (*d*). We may conclude our remarks on the subject of the plea of *autrefois acquit*, by observing that the defendant, in adopting this plea, usually also pleads at the same time the general issue, denying the felony charged; and if the former plea is found against him, the trial proceeds upon the second (*e*).

2. [The plea of *autrefois convict*, or a former conviction (whether judgment was ever given or not) for the same identical crime, is also a good plea in bar to an indictment: and this depends upon the same principle as the former, that no man ought to be twice brought into danger for one and the same crime (*f*): and it is governed in general by the same rules (*g*).] But if the

"person certain, who can be but "once killed." The same law, however, as he himself proceeds to observe, "applies to an indictment "of robbery;" though it is possible that several robberies may be committed on several days.

(*c*) Vide sup. p. 44.

(*d*) See Hawk. P. C. b. 2, c. 35, s. 11; 2 Hale, P. C. 244; Fost. 361; R. *v.* Birchenough, 1 M. C. C. R. 477; R. *v.* Parry, 7 C. & P. 836.

(*e*) See Arch. Cr. L. by Jervis, 9th ed. p. 91; R. *v.* Sheen, 2 Car. & P. 635; Queen *v.* Bird, 20 L. J. (M. C.) 70. As to this plea, and also as to that of *autrefois convict*, it is provided by 14 & 15 Vict. c. 100, s. 28, that "it shall be sufficient "for the defendant to state that "he has been lawfully acquitted "or convicted (as the case may "be) of the said offence charged "in the indictment."

(*f*) Accordingly, a defence in the nature of a plea of *autrefois convict* applies also to offences prosecuted by some method other than indictment, as by way of summary conviction. See Wemyss *v.* Hopkins, Law Rep., 10 Q. B. 378.

(*g*) Hawk. P. C. b. 2, c. 36, s. 10.

former conviction was for a capital offence, and followed by an actual judgment of death, the regular form of this defence is,—

3. The plea of *autrefois attaint*, that is, a former attainder for the same crime (*h*); for this, also, is a good plea in bar, depending upon the same principle, and governed in general by the same rules, as the plea of *autrefois convict*. This plea indeed was at one time of wider application than a plea of *autrefois convict* simply, as it might be pleaded where a man, after being attainted of one felony, was afterwards indicted for *another* offence; for the prisoner being considered as dead in law by the first attainder, and having therefore already forfeited all that he had, it was considered as absurd and superfluous to endeavour to attaint him a second time (*i*). But afterwards, by 7 & 8 Geo. IV. c. 28, s. 4, it was enacted, that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment.

4. Lastly, a *pardon* may be pleaded in bar of the indictment (as well as at a later stage), as at once destroying its end and purpose, by remitting that punishment which the prosecution is calculated to inflict (*j*). In capital offences, there was formerly one advantage that used to attend pleading a pardon in bar, or in arrest of judgment, *before* sentence was passed, which gave it by much the preference to pleading it *after* sentence or attainder. This was, that by stopping the judgment, it stopped the attainder; and prevented that corruption of blood, which used to follow in certain cases on conviction; and which could not afterwards be purged except by Act of Parliament (*k*). But there is now, as we shall see hereafter, no such thing as corruption of

(*h*) As to attainder, vide post, c. XIX.

(*i*) 4 Bl. Com. 336; Hawk. P.C. b. 2, c. 36.

(*j*) As to pardons, vide post, c. XXI.

(*k*) 4 Bl. Com. 338.

blood; and as a pardon is pleadable (according to the period at which it is obtained) not only in bar of the indictment; but, after verdict, in arrest of judgment; or after judgment, in bar of execution:—the further consideration of pardons shall be reserved, till we have gone through every other title except only that of execution.

Before, however, we conclude this head of special pleas in bar, it is proper to observe, [that if a special plea of a prisoner charged with felony shall be found against him upon issue tried by a jury, or adjudged against him in point of law by the court, still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster;* and may proceed to plead over to the felony the general issue, not guilty (*l*). For the law allows many pleas by which a prisoner may escape the punishment of felony, but only one plea in consequence whereof it can be inflicted: viz. on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury.] It remains therefore that we consider—

V. The general issue, that is to say, the plea of *not guilty.* This is the proper form, wherever the prisoner means either to deny or to justify the charge in the indictment; and it is to be observed, that if such charge be of treason or felony there can be no special plea of justification. [Thus on an indictment for murder, a man cannot plead that it was in his own defence, against a robber: but he must plead the general issue, not guilty, and give this special matter in evidence. For, (besides that such pleas do in effect amount to the general issue, since, if true, the prisoner is most clearly not guilty,) inasmuch as the facts in

(*l*) 4 Bl. Com. p. 388; 2 Hale, P. C. 239; R. *v.* Gibson, 8 East, 110. This is confined, as stated in the text, to felonies. It does not apply to indictments, or informations, for misdemeanors (R. *v.* Taylor, 3 B. & C. 502); having been originally established only *in favorem vitæ*, at a time when many felonies were capital.

[treason are laid to be done *proditorie et contra lege antiæ suæ debitum*, and in felony, to be done *felonicè;* the charges of a traitorous or felonious intent are the points and very *gist* of the indictment; and must be answered directly by the general negative, not guilty,—the effect of which is, that on the one hand it puts the prosecutor to the proof of every material fact he has alleged; and on the other it entitles the defendant to avail himself of any defensive circumstances, as amply as if he had pleaded them in a specific form. So that this is, upon all accounts, the most advantageous plea for the prisoner (*m*).]

By the plea of not guilty, the prisoner puts himself upon the trial by jury (*n*); and when the record comes afterwards to be made up,—for the proceedings ought regularly to be *recorded*,—the prosecutor on the part of the Crown adds the *similiter* (as it is called), by the words that he "doth the like" (*o*). But even before this formal entry, the similiter is supposed to be added by the prosecutor, immediately on the plea of not guilty being pleaded by the defendant (*p*),—which brings the parties to issue.

(*m*) 2 Hale, P. C. 258. It will be remembered that the court may order the plea of not guilty to be entered for the defendant, when he stands mute of malice, &c.; vide sup. p. 390.

(*n*) The defendant, on pleading not guilty, used formerly to refer the matter expressly to the trial by jury; but by 7 & 8 Geo. 4 c. 28, s. 1, he is now to be deemed to do so (in treason or felony) by simply pleading not guilty.

(*o*) By 7 Geo. 4, c. 64, s. 20, no judgment after verdict shall be stayed or reversed for want of a *similiter*.

(*p*) Other ceremonies were formerly observed,—which involved the true etymology of the word *culprit*. Thus when the prisoner pleaded not guilty, *non culpabilis*, or *nient culpable*, it was abbreviated on the minutes of the court thus, "*non* (or *nient*) *cul.*" and the joining of issue thereon by the prosecutor was expressed by the abbreviation "*prit.*," the precise origin of which latter expression is somewhat doubtful. In course of time, it became the practice for the officer of the court to read aloud these words, without regard to their real meaning (which was beginning to be forgotten, owing to the disuse of law French); and to apply them as an appellation of the prisoner himself; for when a prisoner pleaded not guilty, the officer used to say, "*Culprit*, how wilt thou be tried?" to which the latter usually added, "By God, and the country," meaning by a jury.

And then they proceed as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

(See 4 Bl. Com. 339, and note by Christian.) Blackstone also (ubi sup.) takes occasion, in reference to this subject, to remark upon another corruption of the old law French which is still observable; viz. in the prologue to all our public proclamations, *oyez*, or *hear ye*, which is generally pronounced by the crier, most unmeaningly, *oh! yes!*

CHAPTER XVIII.

OF TRIAL AND CONVICTION.

[THE several methods of trial and conviction of offenders, established by the laws of England, were formerly more numerous than at present, and this by reason of the superstition of our Saxon ancestors; who like other northern nations, were extremely addicted to divination, a character which Tacitus observes of the antient Germans (*a*). They therefore invented certain methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless.] To these, though most of them have been long since, and all are now, abolished, some notice seems to be due, on account of their legal and historical associations, and as matter of curiosity,—before we proceed to those existing methods which constitute the proper subject of the chapter (*b*).

I. [The most antient species of trial was that by *ordeal* (*c*) which was peculiarly distinguished by the appellation of *judicium Dei*, and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sorts,

(*a*) De Mor. Germ. 10.

(*b*) Vide sup. p. 340.

(*c*) Wilk. Leges Ang. Sax. LL. Inæ, c. 77. See as to this ordeal, Turn. Angl. Sax. vol. ii. p. 532; Hall. Mid. Ag. vol. ii. p. 466; in which last work an instance is given of a citizen of London who underwent the ordeal of cold water, on a charge of murder, in the reign of Henry the second; and having failed therein, was hanged.

[either *fire*-ordeal, or *water*-ordeal; the former being confined to persons of higher rank, the latter to the common people (*e*). Both these might be performed by deputy; but the principal was to answer for the success of the trial, the deputy only venturing some corporal pain for hire, or perhaps for friendship (*f*). Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three pounds weight; or else by walking,—bare foot, and blindfold,—over nine red-hot ploughshares, laid lengthwise, at unequal distances; and if the party escaped being hurt, he was adjudged innocent: but if it happened otherwise, (as without collusion it usually did,) he was then condemned as guilty. However, by this latter method, Queen Emma, the mother of Edward the Confessor, is mentioned to have cleared her character, when suspected of familiarity with Alwyn, Bishop of Winchester (*g*).

Water-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby: or by casting the person suspected into a river or pond of cold water, where if he floated without any action of swimming, it was deemed an evidence of his guilt, but if he sank, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity that has been practised in many countries, to discover witches by casting them into a pool of water, and drowning them to prove their innocence. And in the eastern empire the fire-ordeal was used to the same purpose by the emperor Theodore Lascaris; who, attributing his sickness to magic, caused all those, whom he suspected, to handle the hot iron: thus joining, as has

(*e*) "*Tenetur se purgare is qui accusatur, per Dei judicium; scilicet per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum, si fuerit homo liber; per aquam, si fuerit rusticus.*"—Glanv. s. 14, c. 1. See also Mirrour, c. 3, s. 23.

(*f*) This is still expressed in that common mode of speech, "of going through fire and water to serve another."

(*g*) Tho. Rudborne, Hist. Maj. Winton. l. 4, c. 1.

[been well remarked, to the most dubious crime in the world the most dubious proof of innocence (*h*).

And indeed this purgation by ordeal, seems to have been very antient, and very universal, in the times of superstitious barbarity. It was known to the antient Greeks; for, in the Antigone of Sophocles, a person suspected by Creon of a misdemeanor, declares himself ready "to handle hot iron and to walk over fire," in order to manifest his innocence; which, the scholiast tells us, was then a very usual purgation (*i*). And Grotius gives us many instances of water-ordeal in Bithynia, Sardinia, and other places (*k*).

One cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless cleared by a miracle; and of expecting that all the powers of nature should be suspended, by an immediate interposition of Providence to save the innocent, whenever it was presumptuously required. And yet in England, so late as King John's time, we find grants to the bishops and clergy, to use the *judicium ferri, aquæ, et ignis* (*l*). And both in England and Sweden, the clergy presided at this trial; and it was only performed in the churches or in other consecrated grounds: for which Stiernhook gives the reason, "*non defuit illis operæ et laboris pretium; semper enim ab ejusmodi judicio, aliquid lucri sacerdotibus obveniebat*" (*m*). But to give it its due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cum sit contra præceptum Domini, non tentabis Dominum Deum tuum*" (*n*). Upon this authority,—though the canons themselves were of no validity in England,—it was thought proper to disuse and abolish this trial entirely in

(*h*) Sp. L. b. 12, c. 5.

(*i*) V. 270.

(*k*) Grot. on Numb. v. 17. And see Mod. Univ. Hist. vii. 266.

(*l*) Spelm. Gloss. 435.

(*m*) De Jure Sueon. l. 1, c. 8.

(*n*) Decret. part 2, caus. 2, qu. 5, dist. 7; Decret. lib. 3, tit. 50, c. 9; and Gloss. ibid.

[our courts of justice by an act of parliament in the third year of Henry the third, according to Sir Edward Coke (*o*); though it seems rather to have been by an order of the king in council (*p*).

II. Another species of purgation,—somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition,—was the *corsned*, or morsel of execration, being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism, desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment if he was innocent (*q*); as the water of jealousy, among the Jews, was, by God's special appointment, to cause the belly to swell, and the thigh to rot, if the woman was guilty of adultery (*r*). This corsned, then, was given to the suspected person, who at the same time also received the holy sacrament (*s*); if, indeed, the corsned was not (as some have suspected) the sacramental bread itself, till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us, that Godwin, earl of Kent, in the reign of king Edward the Confessor, abjuring the death of the king's brother, at last appealed to his corsned, "*per buccellam deglutiendam abjuravit;*" which stuck in his throat and killed him (*t*). This custom has long since fallen into complete disuse; though the remembrance of it still sub-

(*o*) 9 Rep. 32. It had been abolished in Denmark above a century before. (Mod. Univ. Hist. xxxii. 105.)

(*p*) 1 Rym. Fœd. 228; Spelm. Gloss. 326; 2 Pryn. Rec. Append. 20; Seld. Eadm. fol. 48.

(*q*) Spelm. Gloss. 439.

(*r*) Numb. v.

(*s*) "*Si quis alteri ministrantium accusetur et amicis destitutus sit cum sacramentales non habeat, vadat ad judicium quod Anglicè dicitur* 'corsned' *et fiat sicut Deus velit, nisi super sanctum corpus Domini permittatur ut se purget.*" — Wilk. Leges Ang. Sax. LL. Canut. c. 6.

(*t*) Ingulph.

[sists, in certain phrases of abjuration retained among the common people (*u*).

III. The trial by *battle*, duel, or single combat (*x*); was another species of presumptuous appeal to Providence, under an expectation that Heaven would unquestionably give the victory to the innocent or injured party. The first written injunction of judiciary combats that we meet with, is in the laws of Gundebald, A.D. 501, which are preserved in the Burgundian code; yet it does not seem to have been a local custom of this or that particular tribe, but to have been the common usage of all the northern people from the earliest times (*y*).] This species of trial used to obtain not only in appeals on criminal charges (*z*) and in approvement (*a*), but also in the antient but now abolished civil action called a writ of right, which formerly was the only action by which land could be recovered (*b*). And the ceremonials observed were very similar, whether the issue to be tried arose in a civil action or on a criminal charge, except that in the latter case the combat was waged by the parties themselves, and not by champions, as in the

(*u*) As "I will take the sacrament upon it," "May this morsel be my last," and the like.

(*x*) On the subject of trial by combat, some valuable information will be found in Hallam's Mid. Ag. vol. i. pp. 277—294.

(*y*) Seld. on Duels, c. 5; et vide Stiern. de Jure Sueon. l. 1, c. 7. Mr. Hallam says (vol. i. p. 278, *in notis*), that it may be met with under the first Merovingian kings in France; and was established by the laws of the Alemanni or Swabians, and also of the Lombards; and he cites Baluz. t. 1, p. 80, and Muratori, Script. Rer. Ital. t. 2, c. 65.

(*z*) As to appeals, vide sup. p. 377.

(*a*) 2 Hale, P. C. p. 233. As to approvements, vide sup. p. 392.

(*b*) Vide sup. bk. v. The last occasion on which trial by battle in a *writ of right* was awarded, of which we have an authentic account, was in the 13 Eliz. in the year 1571; and it was granted, says Sir Henry Spelman, *non sine magnâ jurisconsultorum perturbatione*. (See Dyer, 301, from whose report it appears that no actual combat took place, the demandants making default.) Blackstone, however (vol. iii. p. 338), refers to a later trial by battle, which he states was waged in the county palatine of Durham in 1638. (See Cro. Car. 512.)

civil action (*d*). Thus in *a writ of right* (respecting which the accounts handed down to us are the more copious, and from which therefore what follows as to this method of trial is chiefly drawn), we find that when the tenant pleaded the general issue; viz. that he had more right to hold the land than the demandant to recover; [he might offer to prove such plea by the body of his champion (*e*): which tender being accepted by the demandant, the champion for the tenant threw down his glove, as a gage or pledge; and was then said to *wage* battle with the champion of the demandant; who by taking up the gage or glove accepted, on his part, such challenge (*f*). A piece of ground was then set out; and the champions were introduced, armed with batons and staves an ell long, and a four-cornered leather target. In the court military, indeed, they fought with sword and lance, according to Spelman and Rushworth: as likewise, in France, only villeins fought with the buckler and baton; gentlemen, armed at all points. And upon this and other circumstances, Montesquieu hath, with great ingenuity, not only deduced the impious custom of private duels on imaginary points of honour,—but hath also traced the heroic madness of knight errantry, from the same original of judicial combats (*g*). But to proceed:

When the champions arrived within the lists, the champion of the tenant took his adversary by the hand, and made oath that the tenements in dispute were not the right of the demandant; and the champion of the demandant, then taking the other by the hand, swore in the same manner that they were; next an oath against sor-

(*d*) See Flet. l. 1, c. 34; Hawk. P. C. b. 2, c. 45.

(*e*) The wager of battle was the only decision of the question of right on a writ of right, after the Conquest,—until Henry the second by consent of parliament, introduced the *grand assize*, a peculiar species of trial by jury, in concurrence therewith; giving the tenant his choice of either the one or the other. The establishment of this alternative, Glanvil, chief justice to Henry the second, and probably his adviser herein, considers as a most noble improvement, (as in fact it was,) of the law. (L. 2, c. 7.)

(*f*) 3 Bl. Com. 338, 339.

(*g*) Sp. L. b. 28, cc. 20, 22.

[cery and enchantment, was taken by both champions, in this or a similar form, "Hear this, ye justices, that I "have this day neither eat, drank, nor have upon me "neither bones, stones, ne grass, nor any enchantment, "sorcery, or witchcraft, whereby the law of God may be "abased, or the law of the devil exalted.—So help me "God and his saints" (*h*).

The battle was thus begun; and the combatants were bound to fight till the stars appeared in the evening: and if the champion of the tenant could defend himself till the stars appeared, the tenant was to prevail in his cause; but if victory declared itself for either party, for him was judgment finally given. This victory might arise from the death of either of the champions, or by either of them proving *recreant*, i. e., yielding, and pronouncing the horrible word of *craven;* a word of disgrace and obloquy, rather than any determinate meaning (*i*). The effect of the termination of the battle in either of these modes was, that the vanquished party forfeited his claim, and paid a fine (*k*); and the champion, if recreant, was condemned *amittere liberam legem;* i. e., to become infamous, and not to be accounted *liber et legalis homo*,—being supposed by the event to be proved forsworn, and not fit to be put upon a jury, or admitted as a witness in any cause (*l*).]

(*h*) See 3 Bl. Com. p. 340, who cites Dyer, 301, and Spelm. Gloss. 103. See also Rushw. Coll. vol. ii. pt. 2, fol. 112; 19 Rym. 322; R. *v.* Dryden, Cro. Car. 512, and 11 Harg. St. Tr. 124, where will be found an account of the proceedings in the last trial by battle, which took place in this country, viz. that in the case of Lord Rea *v.* Ramsey (see also 7 Car. 1). Mr. Hallam (vol. 1, p. 278, 7th ed.) refers for the ceremonies of trial by combat, to Houard, Anc. Loix de France, t. 1, p. 264; Velly, t. 6, p. 106; Recueil des Historiens, t. 2, pref. p. 189; Ducange v. *Duellum*. But he says the great original authorities are the Assises de Jerusalem, c. 104, and Beaumanoir, c. 31.

(*i*) Bl. Com. ubi sup.

(*k*) Hall. Mid. Ag. vol. i. p. 278, 7th ed.

(*l*) Bl. Com. ubi sup. The compiler of the *Assises de Jerusalem*, c. 167, thinks it would be very injurious if no wager of battle were to be allowed against witnesses in causes affecting succession; since otherwise every right heir might be disinherited; as it would be easy to find two persons who would perjure themselves for money, if they had no fear of being challenged for their testimony. The demandant's

So also, in an appeal or approvement on a *criminal* charge, the trial by battle, if demanded by the appellee, was carried on with equal solemnity as above described when it was waged in a writ of right: [but as each party was here to fight in his own proper person,—the appellant or approver, if a woman, a priest, an infant, or of the age of sixty, or lame or blind, might counterplead, and refuse this method of trial; and might compel the appellee to put himself upon the country, that is, submit to trial by jury. And peers of the realm, bringing an appeal, were not to be challenged to wage battle, on account of the dignity of their persons; nor the citizens of London by special charter, because fighting seems foreign to their education and employment. So likewise if the crime were notorious, as if the thief were taken with the *mainour*, or the murderer in the room with the bloody knife,—the appellant might counterplead and refuse the tender of battle from the appellee (*n*); for it was unreasonable that an innocent man should stake his life against one who was already half convicted (*o*).

As already hinted, the form and manner of waging the battle upon appeals and approvements, were much the same as upon a writ of right, only the oaths of the two combatants were vastly more striking and solemn (*p*). The appellee, when appealed of the felony, pleaded not guilty, and threw down his glove; and declared he would defend the same with his body. The appellant, in accepting the challenge, took up the glove; and replied that he was ready to make good his appeal, body for body: and thereupon the appellee, taking the Bible in his right hand, and in his left the right hand of his antagonist, swore to

champion was in fact a *witness* upon the question of right; and this passage, as Mr. Hallam remarks, "indicates the real cause of "preserving the judicial combat; "systematic perjury in witnesses, "and want of legal discrimination "in judges."—Hallam, Mid. Ag. vol. i. p. 282, 7th ed.

(*n*) Hawk. P. C. b. 2, c. 45, s. 7.

(*o*) 4 Bl. Com. 347.

(*p*) Flet. l. 1, c. 34; Hawk. P. C. b. 2, c. 45.

[this effect, "*Hoc audi, homo, quem per manum teneo, &c.,*" "Hear this, O man, whom I hold by the hand, who callest "thyself John by the name of baptism, that I, who call "myself Thomas by the name of baptism, did not felo- "niously murder thy father, William by name, nor am "anywise guilty of the said felony; so help me God and "the saints: and this I will defend against thee by my "body, as this court shall award." To which the appellant replied, holding the Bible and his antagonist's hand in the same manner as the other, "Hear this, O "man, whom I hold by the hand, who callest thyself "Thomas by the name of baptism, that thou art perjured; "and therefore perjured, because that thou feloniously "didst murder my father, William by name; so help me "God and the saints: and this will I prove against thee "by my body, as this court shall award" (*q*). The battle was then fought with the same weapons, the same solemnities and the same oaths against amulets and sorcery, that were used in the civil combat: and if the appellee were so far vanquished as not to be able or willing to fight any longer, he was adjudged to be hanged immediately; and then, as also if he were slain in the battle, Providence was deemed to have determined against him, and his blood was attainted. But if he killed the appellant, or could maintain the fight from sun rising till the stars appeared in the evening, he was acquitted. So also if the appellant became recreant, and pronounced the word craven, he lost his *liberam legem*, and became infamous; and the appellee recovered his damages, and was for ever quit, not only of the appeal, but of all indictments likewise for the same offence (*r*).]

(*q*) There is a striking resemblance between this process and that of the court of Areopagus, at Athens, for murder; wherein the prosecutor and prisoner were both sworn in the most solemn manner: the prosecutor that he was related to the deceased (for none but near relatives were permitted to prosecute in that court), and that the prisoner was the cause of his death; the prisoner, that he was innocent of the charge against him. (Pott. Antiq. b. 1, c. 19.)

(*r*) 4 Bl. Com. 348.

It is not a little singular that this method of trial remained a part of our legal system till the early part of the present century. It was, however, abolished by statute (59 Geo. III. c. 46), attention having been drawn to the inconvenience of its retention, by a case which occurred in the year 1818,—in which an appeal of murder having been brought by the brother of the deceased, the party accused (who had already been acquitted on an ordinary indictment) demanded a trial by battle; but nothing further was done in the matter, the proceedings being discontinued by the appellant (*s*).

IV. [Another method of trial in criminal cases, is that by the peers of Great Britain, in the court of parliament, (or in the court of the lord high steward,) when a peer, or peeress, is charged with any treason or felony, or misprision of either. Of this enough has been said in a former chapter (*t*): to which we shall only now add, that in the method and regulation of its proceedings, it differs but little from the trial *per patriam* or by jury, of which we are about to speak; except that no special verdict can be here given (*u*), because the lords of parliament,—or the lord high steward, if the trial be had in his court,—are judges sufficiently competent of the law that may arise from the fact: and except, also, that the peers need not all agree in their verdict: but the greater number, consisting of twelve at the least, will conclude and bind the minority (*x*).

V. The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the Great Charter: "*nullus liber homo capiatur, vel*

(*s*) The case referred to in the text is that of Ashford *v.* Thornton, reported in 1 Barn. & Ald. 405.

(*t*) Vide sup. pp. 293, 296.

(*u*) Hatt. 116.

(*x*) Kelynge, 56; stat. 7 & 8 Will. 3, c. 3, s. 11; Foster, 247.

[*imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium parium suorum, vel per legem terræ*" (*y*).

The excellence of this method of trial, holds still stronger in criminal than in civil cases: since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the Sovereign and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the Crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted, without check or control, by justices of *oyer* and *terminer* occasionally named by the Crown; who might then imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have with excellent forecast contrived, that no man shall be called to answer to the Crown for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury (*z*); and that the truth of every accusation, whether preferred in the shape of indictment or information, shall afterwards be brought to trial and confirmed by the unanimous suffrage of twelve of the equals and neighbours of the person accused, indifferently chosen, and superior to all suspicion.

(*y*) 25 Edw. 1, c. 29.

(*z*) These remarks from Blackstone (vol. iv. p. 359) are as true now as when they were written; but it is to be observed that the preparatory presentment of a grand jury is required (as the general rule) in *all* indictable offences; unless in a case where they are dealt with by a court of summary jurisdiction, which, as we have seen, is now in some cases permitted. (Vide sup. p. 326.)

[What has been already said of juries in general, and the trial thereby in civil cases, will greatly shorten our present remarks with regard to the trial of *criminal* indictments and informations. Which trial we shall consider in the same method that we did the former,—by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.]

When, therefore, a prisoner has pleaded *not guilty*, the next step is to impanel and swear for the purposes of the trial, a jury,—called, (when intended to distinguish them from a grand jury,) a *petty* jury,—consisting of twelve persons of the county (*a*), whose qualification is the same as that of jurors in civil causes. But it is a rule that no person who was of the grand jury by which the bill was found, is competent to sit upon the petty jury (*b*). If the proceedings are before the Queen's Bench division of the High Court of Justice, an interval after the plea elapses before the trial; during which, process issues for summoning a jury, as in civil causes: and the trial is then either at bar (*c*) or at *nisi prius*, as mentioned in a former place (*d*). But if the trial is at the assizes or sessions, it has always been usual to try persons charged with felony immediately or soon after their arraignment (*e*). As to *misdemeanors*, however, it was formerly not customary, (unless by consent of parties, or where the defendant was actually in gaol,) to try persons indicted thereof, at the same assizes or sessions in which they had pleaded *not guilty* to the indictment. But it was provided by 14 & 15 Vict. c. 100, s. 27, that no person prosecuted shall be entitled as of right to *traverse* (that is, postpone,) the trial of any indictment found against him at

(*a*) 2 Hale, P. C. 264; Hawk, P. C. b. 2, c. 40. As to the finding of the indictment, vide sup. p. 358.

(*b*) 25 Edw. 3, st. 5, c. 3.

(*c*) On an information *ex officio*, the attorney-general is entitled to demand a trial at bar, if he thinks proper. (1 Chit. Cr. L. 848.)

(*d*) Vide sup. p. 302.

(*e*) 2 Hale, P. C. 263; 2 Arch. Just. 18. And see 6 Geo. 4, c. 50, s. 13; 7 Geo. 4, c. 64, s. 21; 15 & 16 Vict. c. 76, s. 105.

any session of the peace, of oyer and terminer, or of gaol delivery (*f*); but that if the court,—upon the application of such person or otherwise,—shall be of opinion that he ought to be allowed a further time either to prepare his defence or otherwise, it may adjourn the trial to the next subsequent session, on such terms as to bail or otherwise, as shall seem meet; and may respite the recognizances of the prosecutor's witnesses accordingly. In misdemeanors, also, in cases where the record is in the Queen's Bench division of the High Court of Justice, the trial may, by leave of the court, be before a *special* jury; but a special jury is not allowed in misdemeanors tried at the sessions or assizes; nor is it ever allowed in cases of high treason or felony.

In connection with the subject of trial, we may remark here, that in the case of high treason generally, (but with the exception of an attempt to assassinate the sovereign,) it was enacted by statute 7 & 8 Will. III. c. 3, that no person shall be tried for the same, or for any misprision thereof, unless the indictment be found within *three years* after the offence was committed; and also that the prisoner shall have the same compulsory process to bring in his witnesses *for* him, as is used to compel their appearance *against* him. And by statutes of 7 Anne, c. 21, and 6 Geo. IV. c. 50, s. 21, the prisoner is entitled,—in case of high treason, generally, and misprision thereof,—to have a copy of the indictment, and a list of the witnesses to be produced against him, *and also of the jurors*, delivered to him before the trial (*g*). But by 5 & 6 Vict. c.

(*f*) To *traverse*, properly signifies to plead in denial; but in the practice of the criminal courts, the word has been ordinarily thus used in connection with a postponement of the trial.

(*g*) If the indictment is in any court other than the Queen's Bench Division, a list of the petty jury must be given to the person charged, together with the copy indictment, ten days before the arraignment, in the presence of two or more credible witnesses. If the indictment *is* in such Division, the copy indictment shall be delivered as above, but the jury list may be delivered afterwards, but so that it be ten days before the trial (see 6 Geo. 4, c. 50, s. 21, R. *v.* Frost, 2 Mood. C. C. 140). It may be noticed that in the case of an offence not provided for by the above enactments, (and not being such a prosecution as is

51 (*h*), it was provided, that in all cases of high treason in compassing or imagining any bodily harm tending to the death or destruction, maiming or wounding, of the Queen, (and in all cases of misprision of any such treason,) where the overt act or acts shall be an attempt to injure in any manner the person of the Queen,—the person charged shall be indicted, arraigned, tried, and attainted in the same manner and according to the same course and order of trial in every respect, and upon the like evidence, as if he stood charged with *murder;* and that no indictment for such high treason shall be within any of the provisions of the several Acts of 7 & 8 Will. III., 7 Anne, or 6 Geo. IV., above referred to.

When the trial is called on in court, the jurors are to be sworn, as they appear, to the number of twelve; unless they are challenged by the party (*i*).

Challenges may be made, either on the part of the Crown, or that of the prisoner; and either to the whole array or to the separate polls; and for the very same reasons that they may be made in civil cases. For it is here at least as necessary, as in those, that the sheriff or returning officer be totally indifferent; and that the particular jurors should be *omni exceptione majores;* not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum* or *propter delictum* (*k*). It may be observed

dealt with by 60 Geo. 3 & 1 Geo. 4, c. 4, s. 8,) the allowance of a copy of the indictment, and a list of the witnesses, is in the discretion of the court; though, in practice, they are always allowed both in felonies and misdemeanors. (1 Chit. Cr. L. 403.) As to the right of an accused person to have copies of the *depositions* taken before the magistrates, vide sup. p. 355.

(*h*) Vide sup. p. 179. See also 39 & 40 Geo. 3, c. 93.

(*i*) By 30 & 31 Vict. c. 35, s. 8. a juror, who shall refuse or be unwilling from alleged conscientious motives to be sworn, may be permitted by the court, on being satisfied of the sincerity of such objection, to make solemn affirmation or declaration instead.

(*k*) By 6 Geo. 4, c. 50, s. 50, no man shall serve on a jury for the trial of a capital offence, who shall not be qualified as a juror in civil causes within the same county, city, or place.

here that, the privilege formerly allowed to aliens in civil, as well as criminal cases, of challenging the array, on the ground that the sheriff has not returned a jury *de medietate linguæ*—that is, a jury one-half of which consisted of aliens, supposing so many to be found in the place,—though preserved by the express enactment of 6 Geo. IV. c. 50, s. 47, in favour of persons indicted for felony or misdemeanor (*l*); has now been taken away by the Naturalization Act, 1870, it being enacted by that statute that after its date an alien shall not be entitled to be tried by a jury *de medietate linguæ*, but shall be triable in the same manner as if he were a natural-born subject (*m*).

[Challenges upon any of the foregoing accounts, are styled challenges *for cause;* which may be without stint in both criminal and civil trials (*n*). But in criminal cases, or at least in cases of felony (*o*), there is allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all,—which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: 1. As every man must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner, when put to his defence, should have a good opinion

(*l*) This Act repealed (s. 62) the former statutes on this subject, viz. 27 Edw. 3, st. 2, c. 8; 28 Edw. 3, c. 13, and 8 Hen. 6, c. 29. This privilege of aliens, we may remark here, was taken away in cases of *high treason*, by 1 & 2 P. & M. c. 10.

(*m*) 33 & 34 Vict. c. 14, s. 5.

(*n*) Besides these challenges by the parties, the court itself is empowered to amend or enlarge the panels of jurors, by taking out the names of individuals and inserting others where necessary. (6 Geo. 4, c. 50, s. 20.) This Act, by sect. 62, repeals the former Act of 3 Hen. 8, c. 12, on the same subject.

(*o*) Blackstone says that a peremptory challenge is allowed in "capital" felonies, *in favorem vitæ*. (4 Bl. Com. 353.) But the practice extends to all *felonies*, though not (as pointed out in the Report of the Criminal Code Bill Commission, p. 36) to any misdemeanor. (See also Co. Litt. 156 b.)

[of his jury,—the want of which might totally disconcert him,—the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, to set him peremptorily aside.]

This privilege of peremptory challenges, though granted to the prisoner, is denied to the Crown by 6 Geo. IV. c. 50, s. 29; which, (repealing and re-enacting the former Act of 33 Edw. I. (Ordin. de Inquis.) on the same subject,) provides that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. [However, it is held that the king need not assign his cause of challenge till all the panel is gone through; nor unless there cannot be a full jury without the persons so challenged (*p*). And then and not sooner, the counsel for the Crown must show cause, otherwise the juror shall be sworn (*q*).

The peremptory challenges of the prisoner must, however, have some reasonable boundary, otherwise he might never be tried. This reasonable boundary was settled by the common law to be the number of thirty-five: that

(*p*) In the case of Mansell *v.* The Queen (in error), 8 Ell. & Bl. 54, the law, as here laid down by Blackstone, in vol. iv. p. 353, was confirmed;—the court of Queen's Bench observing, that neither by 33 Edw. 1 (Ordin. de Inquis.), nor by 6 Geo. 4, c. 50, was there any intention to take away "all power of "peremptory challenge from the "Crown, &c., and the course has in- "variably been to permit the Crown "to challenge without cause, till "the panel has been called over and "exhausted, and then to call over "the names of the jurors peremp- "torily challenged by the Crown, "and put the Crown to assign "cause, so that if twelve of those "upon the panel remain, as to "whom no just cause of exception "can be assigned, the trial may "proceed," &c.

(*q*) Hawk. P. C. b. 2, c. 43, s. 3; 2 Hale, P. C. 271. And the practice is the same both in trials for misdemeanors and for capital offences. (3 Harg. St. Tr. 519.)

[is, one under the number of three full juries (*r*). For the law judged that five-and-thirty were fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenged a greater number, or three full juries, had no intention to be tried at all.] But by 6 Geo. IV. c. 50, s. 29 (repealing and re-enacting the former provision of 22 Hen. VIII. c. 14, on the same subject),—no person arraigned for murder or felony shall be admitted to any peremptory challenge above the number of twenty; which is also the extreme number in such cases of high treason as come under the provisions of 5 & 6 Vict. c. 51 (*s*); though in other kinds of high treason, the number remains thirty-five as at common law (*t*). And by 7 & 8 Geo. IV. c. 28, s. 3, if any person indicted for treason, felony, or piracy, shall challenge peremptorily a greater number of the jury than such person is entitled by law to challenge in any of the said cases; every such peremptory challenge beyond the number allowed by law, shall be entirely void: and the trial of such person shall proceed, as if no such challenge had been made.

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded, as in civil cases; supposing the prosecution to be in the Queen's Bench division of the High Court of Justice (*u*). But if it be at the assizes or sessions, the course is for the court to order, *ore tenus*, a new panel to be returned *instanter* (*v*). When at last the proper number, free from all exception, are obtained, they are sworn; and the form of oath in cases of felony, or wherever the defendant appears in person, is as follows:

(*r*) 2 Hale, P. C. 269.

(*s*) By 5 & 6 Vict. c. 51, there is to be in this case "the same course and order of trial in every respect" as in a charge of murder (vide sup. p. 419).

(*t*) This is by the effect of 1 & 2 P. & M. c. 10, s. 7. See Hawk. P. C. b. 2, c. 43, s. 8.) As to the number of challenges allowed in misprision of treason generally, it seems doubtful. (Hawk. ubi sup. sect. 5.)

(*u*) Vide Arch. Pr. (13th ed.), p. 353.

(*v*) 4 Inst. 168; 4 St. Tr. 728.

"You shall well and truly try, and true deliverance make, "between our sovereign lady the Queen, and the prisoner "whom you have in charge: and a true verdict give "according to the evidence. So help you God" (*x*).

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced, by the counsel for the prosecution. And it was formerly the rule, that no counsel should be allowed a prisoner upon his trial on any charge of felony, (though it was otherwise in an indictment for a misdemeanor,) unless some point of law should arise proper to be debated (*y*): though the judges made no scruple to allow a prisoner's counsel to instruct him what questions to ask, or even to ask questions for him with respect to matters of fact: and, as to matters of law considered the prisoner as *entitled* to the assistance of counsel (*z*). And by 7 & 8 Will. III. c. 3, it was provided in the case of high treason generally, that he might make defence by counsel not exceeding two; and the same indulgence was by 20 Geo. II. c. 30, extended to *parliamentary impeachments* for treason; which had been excepted

(*x*) Vide sup. p. 419, n. (*i*).

(*y*) Sir E. Coke (3 Inst. 137) gives this reason for excluding counsel for the prisoner, "because "the evidence to convict a pri- "soner should be so manifest as it "cannot be contradicted." And Lord Nottingham, when high steward, declared (3 St. Tr. 726), that this was the only good reason that could be given for it. Such exclusion, however, was strongly disapproved by Blackstone; who remarks (vol. iv. p. 355), that however it might be palliated under cover of that noble declaration of the law, that the judge shall be counsel for the prisoner, it is not at all of a piece with the rest of the "humane "treatment of prisoners by the Eng- "lish law." And he adds, on the authority of the Mirrour (c. 3, s. 1), that counsel were allowed under the more antient common law.

Father Parsons, the Jesuit, and, after him, Bishop Ellys, (Of English Liberty, vol. ii. p. 66,) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Henry the first; meaning, apparently, chapters 47 and 48 of the code which is usually attributed to that prince; but it may be doubted if the expression *uti consilio* there cited refers to the right to have counsel in court.

(*z*) 4 Bl. Com. p. 356.

in the former Act. But the law on this subject is now governed by 6 & 7 Will. IV. c. 114, which put aside the antient rule altogether; and in effect provided, that all persons tried for felonies as well as misdemeanors, should be admitted to make full answer and defence by their counsel; or, in courts where solicitors practise as advocates, by their solicitor.

The rules of evidence and the practice generally which prevail in courts of criminal judicature, are the same in most respects as those which obtain in trials in the civil courts, though there are some points of difference. However, with the view of assimilating them as far as possible, it was enacted by 28 & 29 Vict. c. 18, that (if a person on his trial for felony or misdemeanor shall be defended by counsel (*a*), but not otherwise,) it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask such counsel whether he intends to adduce evidence; and in the event of his not thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall then be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against the person on his trial; and that upon every trial for felony or misdemeanor, the person charged (or his counsel) shall be allowed, if he shall think fit, to open his defence; and after the conclusion of such opening, to examine any witnesses he may think fit to call; and then, to sum up his evidence. The Act, however, contains a proviso that save as altered in the above respects, the practice and course of proceedings in criminal trials (and particularly the right of the Crown to *reply*) shall remain as before it passed.

There are, however, some points wherein a difference between civil and criminal evidence will be found to exist; and among these are the following (*b*):—

(*a*) The word counsel in this Act is to be construed as applying to solicitors in all cases where they appear as advocates. (See 28 & 29 Vict. c. 18, s. 9.)

(*b*) Besides the differences which

First, in all cases of treason and misprision of treason, —by statutes 1 Edw. VI. c. 12; 5 & 6 Edw. VI. c. 11, and 7 & 8 Will. III. c. 3,—*two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence *confess* the same (*c*). [And, by the last-mentioned statute, it is declared, that both of such witnesses must be to the same overt act of treason; or one to one overt act, and the other to another overt act of the same species of treason, and not of distinct heads or kinds: and that no evidence shall be admitted to prove any overt act, not expressly laid in the indictment (*d*). And therefore in Sir John Fenwick's case, in King William's time, (where there was but one witness,) an Act of Parliament was made on purpose to attaint him of treason (*e*); and he was executed thereon (*f*).] Again, in prosecutions for perjury, there can be no conviction except on the oath of two witnesses: though it will be sufficient that the perjury be directly proved by one witness; and that corroborative evidence, on some particular point, be given by another (*g*); and where the alleged perjury consists in the defendant's having contradicted what he himself swore on a former occasion, the testimony of a single witness in support of the defendant's own original statement will support a conviction (*h*). [But, in almost every other accusation, the oath of one positive witness will be sufficient: the exception in case of treason, being allowed in order to secure

here follow, it is to be remarked that some of the rules of evidence which were introduced by 17 & 18 Vict. c. 125, (The Common Law Procedure Act, 1854,) were not intended to apply to criminal, but only to civil cases. One of these, however, viz. sect. 20, permitting any person called as a witness and unwilling from conscientious motives to be sworn to make affirmation instead, was subsequently, by 24 & 25 Vict. c. 66, extended to criminal proceedings. See also 32 & 33 Vict. c. 68, s. 4.

(*c*) 4 Bl. Com. p. 356.

(*d*) See St. Tr. vol. ii. p. 144; Foster, 235.

(*e*) Stat. 8 & 9 Will. 3, c. 4.

(*f*) St. Tr. vol. xi.

(*g*) See R. *v.* Mayhew, 6 Car. & P. 315; R. *v.* Parker, 1 Car. & M. 639; The Queen *v.* Hook, 27 L. J. (M. C.) 222.

(*h*) R. *v.* Harris, 5 B. & Ald. 929.

[the subject more effectually from false accusation in a case so penal, and where there may be danger of his being made the victim of political oppression: in the case of perjury, because it would not be reasonable to convict, where there is only one oath against another (*i*).]

Secondly, a confession of his guilt by the defendant, is in general sufficient to support a conviction. But this is only on the supposition that it is freely and voluntarily made; for otherwise, it is not even admissible in evidence (*k*). If drawn from him, therefore, by means of any threat or promise, it cannot, in general, be received (*l*); and it is in no case evidence, except against himself (*m*). It is also a rule that if any part of a confession is used to establish the case on the part of the prosecution, the whole of it must be given in evidence; though the jury are at liberty to believe those parts which make against the defendant, and to disbelieve what he alleges in his own favour (*n*).

Thirdly, in a former volume it was mentioned, that, as the law now stands, neither the infamous character of a proposed witness, nor his being interested in the testimony

(*i*) 4 Bl. Com. 357; see R. *v.* Muscot, 10 Mod. 194; Champney's case, 2 Lewin, C. C. 258. Montesquieu lays it down, (Sp. L. b. 12, c. 3), that those laws which condemn a man to death, *in any case*, on the deposition of a single witness, are fatal to liberty; and he adds this reason,—that the witness who affirms, and the accused who denies, make an equal balance; and that there is a necessity, therefore, to call in a third man to incline the scale. "But this," says Blackstone (vol. iv. p. 357), "seems to "be carrying matters too far; for "there are some crimes in which "the very privacy of their nature "excludes the possibility of having "more than one witness. Neither, "indeed," he adds, "is the bare "denial of the person accused, "equivalent to the positive oath "of a disinterested witness."

(*k*) See Parker *v.* Green, 2 B. & Smith, 299.

(*l*) See Reg. *v.* Luckhurst, 1 Dearsley's C. C. R. 245; R. *v.* Sleeman, ib. 249; The Queen *v.* Reeve and Hancock, Law Rep., 1 C. C. 362.

(*m*) See also 7 Geo. 4, c. 64, by which provisions were previously made on the same subject, and which 11 & 12 Vict. c. 42, only repeals in part.

(*n*) R. *v.* Clewes, 4 Car. & P. 221.

he is about to give, prevents his being examined, but affects only his credibility; and that the *parties* to the cause are now both competent and compellable (as the general rule) to give evidence (*o*). But this change as to the effect of interest does not operate so as to allow of the examination at the time of his trial (*p*), of any person charged with any *offence*, whether indictable or punishable by way of summary conviction (*q*).

Fourthly, the deposition or statement on oath of witnesses before magistrates, duly taken according to the provisions either of 11 & 12 Vict. c. 42, s. 17, or of 30 & 31 Vict. c. 35, s. 6,—may be produced at the trial, and given in evidence for or against the defendant, if the party who made the same be dead, too ill to travel, insane, or kept away by the prisoner; or may be given in contradiction of his evidence at the trial, if the deponent be called and examined thereat as a witness (*r*).

(*o*) Vide sup. bk. v. As to the proof of the previous conviction of a witness for crime, see 28 & 29 Vict. c. 18, s. 6; 34 & 35 Vict. c. 112, s. 18.

(*p*) As to the statement, however, of a defendant, made on his being charged before a magistrate, —it will be remembered that when he makes the same *after being duly cautioned*, it is expressly provided by 11 & 12 Vict. c. 42, s. 18, that what he says may be given in evidence against him upon his trial. (Vide sup. p. 351.) See also an exception in the case of *gaming-houses*, noticed sup. p. 248. In the Report of the Criminal Code Bill Commission (p. 37), it is said, "at "present, if the accused is proved "before his trial to have made an "admission, it is evidence against "him; but though he offers to make "the same admission in court, it is "thought that in cases of felony the "judge is obliged to refuse to let "him do so."

(*q*) See Parker *v.* Green, 2 B. & Smith, 299; Bishop of Norwich *v.* Pearse, Law Rep., 2 Ad. & Ecc. Ca. 281. Upon the question as to whether a person on his trial for crime should be allowed to offer himself as a witness, the Report just referred to, makes the following observations:—"As regards the "policy of a change in the law so "important, we are divided in opi-"nion. The considerations in favour "of and against the change have "been frequently discussed, and are "well known. On the whole, we "are of opinion that if the accused "is to be admitted to give evidence "on his own behalf, he should do so "on the same conditions as other "witnesses, subject to some special "protection in regard to cross-"examination." (Ibid.)

(*r*) See R. *v.* Scaife and others,

Fifthly, though, by the general rule of law, all hearsay, —that is, any statement by a witness of what has been said or declared out of court,—is excluded; yet on a charge of homicide, it is the practice to admit testimony as to the dying declarations of the deceased, with respect to the cause of his death,—that is, if made under a sense of approaching dissolution (*s*).

Sixthly, though by 16 & 17 Vict. c. 83, the husband or wife of any party to a legal proceeding, is now in most civil cases competent and compellable to give evidence on behalf of either or any of the parties, yet it was also thereby expressly provided that this is not to extend to compel or enable a husband to give evidence for or against his wife, or a wife to give evidence for or against her husband, in any *criminal* proceeding. Such evidence therefore remains, generally, inadmissible, as it always was by the common law. Yet this rule is open to certain exceptions. Thus, in treason, a wife may give evidence against her husband, because the tie of allegiance is paramount to all others. So upon a charge of forcible abduction and marriage, or other violence to her person, the woman has always been a competent witness against her husband (*t*). And another exception to the general rule has been now made by statute; it being enacted by 40 & 41 Vict. c. 14, that if on the trial of any indictment or proceeding for the non-repair of a nuisance to any public highway, river, or bridge, or instituted *for the purpose of trying or enforcing a civil right only*, every defendant, and the wife or husband of any defendant, shall be admissible witnesses and compellable to give evidence.

20 L. J. (M. C.) 229; Queen *v.* Upton, St. Leonard's, 10 Q. B. 827; Queen *v.* Clements, 30 L. J. (M. C.) 193; Reg. *v.* Beeston, 1 Dearsley's C. C. R. 405; The Queen *v.* Cockburn, 26 L. J. (M. C.) 136; Austin's case (per Willes, J.), 1 Dearsley's C. C. R. 612.

(*s*) See as to dying declarations, R. *v.* Moseley, 1 R. & M. C. C. R. 97; R. *v.* Hayward, 6 Car. & P. 157; R. *v.* Perkins, 9 Car. & P. 395; The Queen *v.* Reany, 26 L. J. (M. C.) 43; The Queen *v.* Hind, 29 L. J. (M. C.) 147.

(*t*) 1 Chit. Bl. 444, n.; 1 Phil. Ev. 71; Lord Audley's case, 3 St. Tr. 402.

[Seventhly, it was an antient and commonly received practice (*u*),—derived from the civil law, and which also has obtained in France (*x*),—that as counsel was not formerly allowed to any prisoner accused of a felony, so neither should he be suffered to exculpate himself therefrom by the testimony of any witnesses. And therefore it deserves to be remembered to the honour of Mary the first, (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous,) that when she appointed Sir Richard Morgan chief justice of the Common Pleas, she enjoined him, "that notwithstanding the "old error which did not admit any witnesses to speak, "or any other matter to be heard, in favour of the ad- "versary, her majesty being party;—her highness's "pleasure was, that whatsoever could be brought in "favour of the subject, should be admitted to be heard; "and moreover, that the justices should not persuade "themselves to sit in judgment otherwise for her highness "than for her subjects" (*y*). Afterwards, in one particular instance,—when embezzling the royal stores was made a capital felony (*z*),—it was provided by statute, that any person impeached for such felony "should "be received and admitted to make any lawful proof "that he could, by lawful witness or otherwise, for his "discharge and defence:" and, in general, the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, though not upon oath (*a*): the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the Crown. Sir Edward Coke protests very strongly against this tyrannical practice; declaring, that

(*u*) St. Tr. i. *passim*.

(*x*) Domat, Pub. Law, b. 3, tr. 1; Montesq. Sp. L. b. 39, c. 11.

(*y*) Hollingsh. 1112; St. Tr. i. 72.

(*z*) This was by 31 Eliz. c. 4, a statute repealed by 7 & 8 Geo. 4, c. 27. As to the existing provision with regard to this offence, vide sup. p. 135.

(*a*) 2 Bulst. 147; Cro. Car. 292.

[he never read, in any Act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and that therefore there was not so much as *scintilla juris* against it (*b*). And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland, (when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties,) they insisted on a clause, and carried it against the efforts of both the Crown and the house of lords, against the practice of the courts in England, and the express law of Scotland, "that in all such trials, "for the better discovery of the truth, and the better "information of the consciences of the jury and justices, "there shall be allowed to the party arraigned the benefit "of such credible witnesses, to be examined upon oath, as "can be produced for his clearing and justification" (*c*). At length, by the statute 7 & 8 Will. III. c. 3, the same measure of justice was established throughout all the realm, in cases of treason causing any corruption of blood, and of misprision thereof: and it was afterwards declared, by statute 1 Anne, st. 2, c. 9, that in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him (*d*).] And now, there is no distinction in this matter between civil and criminal proceedings. In all cases, every witness who is examined in a court of justice must give his evidence under the sanction of an oath, or of some affirmation allowed in substitution of an oath.

(*b*) 3 Inst. 79. See also 2 Hale, P. C. 283, and his Summary, 264.

(*c*) Stat. 4 Jac. 1, c. 1. See Com. Journ. 4, 5, 12, 13, 15, 29, 30 Jun. 1607.

(*d*) Provisions are now made (vide sup. pp. 354, 355) to afford facilities to persons accused of indictable offences, to have the depositions taken of such persons as they may desire to call as witnesses, before they are committed or held to bail; and also for the payment of their expenses, if allowed by the court at the trial.

Lastly, the defendant in a criminal prosecution is allowed to call witnesses to speak, generally, to his character: though he is not allowed to prove particular actions bearing favourably on his character; unless they happen to stand in connection with some of the facts charged and proved against him (*e*). And, on the other hand, the crown seldom, in practice, seeks to put in evidence of general bad character (*f*); and though under certain circumstances it may give proof of a previous conviction for crime (*g*), yet this must be within the restrictions which have been imposed by certain legislative provisions. For by 24 & 25 Vict. cc. 96, 99 (*h*), it was provided that in an indictment under those Acts alleging the offence to have been committed after a previous conviction, the defendant shall, in the first instance, be arraigned upon so much of the indictment as charges the subsequent offence, concerning which only the jury shall, in the first instance, be charged to inquire; and that if they shall find him guilty thereof, or if on arraignment he shall plead guilty to the subsequent offence, then, and not before, the previous conviction shall be inquired into. If, however, the prisoner, in his defence, shall give evidence as to character, the prosecutor may, in answer thereto, give evidence of the previous conviction before the subsequent offence is found: and the jury shall then inquire of the previous conviction and of the subsequent offence, at the same time (*i*). As to the mode of proof, it forms one of the provisions of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 18, that a previous conviction may be proved by producing a record or extract of such conviction; and by giving proof

(*e*) As to evidence to contradict evidence to character, see R. v. Rowton, 34 L. J. (M. C.) 57.

(*f*) Taylor on Evidence, s. 327.

(*g*) Ibid.

(*h*) There is a previous statute on this subject to the same general effect, viz. 6 & 7 Will. 4, c. 111.

(*i*) 24 & 25 Vict. c. 96, s. 116, and c. 99, s. 37. Some doubt appears to be entertained whether this practice is confined to offences under these Acts, or is general. See Arch. Pl. & Ev. 15th ed. p. 831; The Criminal Law Acts, by Greaves, p. 203.

of the identity of the person against whom the conviction is sought to be proved, with the person appearing in the record or extract of conviction to have been convicted.

[When the evidence on both sides is closed,—and indeed when any evidence hath been given,—the jury cannot be discharged, (unless in cases of evident necessity,) till they have given in their verdict (*h*): but are to consider of it, and deliver it in, with the same forms as upon civil causes. But the judge may adjourn, while the jury are withdrawn to confer, and return to receive the verdict in open court (*i*).] And when the trial runs to such a length, that it cannot be concluded in one day, the established practice now is to adjourn the court till the next morning; but the jury, in cases of felony, must be kept somewhere together, so that they may have no communication except with each other (*k*). [Such verdict may be either general, as "guilty" or "not guilty;" or special, setting forth all the circumstances of the case, and praying the judgment of the court (*l*); whether, for instance, on the facts stated, it be murder, manslaughter, a nuisance, or no offence at all. This is where they doubt the matter of law, and therefore choose to leave it to the determination of the court; though they have an unquestionable right of determining

(*h*) Co. Litt. 227; 3 Inst. 110; Foster, 27; Gould's case, Hil. T. 1764. See the Queen *v.* Charlesworth, 1 B. & Smith, 460. The discretion of a judge with regard to the discharge of a jury before verdict cannot be considered in a court of error. (Winsor *v.* The Queen, Law Rep., 1 Q. B. 289; S. C. in error, ib. 390.)

(*i*) 3 St. Tr. 731; 4 St. Tr. 231, 455, 485.

(*k*) Stone's case, 6 T. R. 527; 1 Chit. C. L. 632. It is remarked in the Report of the Criminal Code Bill Commission (p. 37), that "the "jury may separate in cases of mis-"demeanor but not in cases of "felony." In reference to the same matter of discharge, the Report observes that at present a verdict cannot be taken on a *Sunday*.

(*l*) See an example of a special verdict, in an indictment for a nuisance tried in 1837, R. *v.* Tindall, 6 A. & E. 143. It is, however, observed in the Report just referred to (ib.), that "proceedings "on special verdicts have practi-"cally fallen into disuse."

[upon all the circumstances, and finding a general verdict, —if they think proper so to hazard a breach of their oaths. But the practice some time in use, of fining, imprisoning, or otherwise punishing jurors, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal. And it is treated as such, by Sir Thomas Smith, two hundred years ago; who accounted such doings "to be very violent, tyrannical, and "contrary to the liberty and custom of the realm of Eng-"land" (*m*). For, as Sir Matthew Hale well observes, it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions: unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless (*n*). Yet, in many instances, where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside; and a new trial granted by the Queen's Bench (*o*). But there hath yet been no instance of granting a new trial, where the prisoner was found *not* guilty on the first (*p*).

If the jury therefore find the prisoner not guilty, he is

(*m*) Smith's Commonw. 1. 3, c. 1.

(*n*) 2 Hale, P. C. 313.

(*o*) The cases of new trial in the books, are all of *misdemeanor* (see R. *v.* Read, 1 Lev. 9; St. Tr. x. 416; R. *v.* Whitehouse, 1 Dearsley, C. C. 1; R. *v.* Manby, 6 T. R. 619; R. *v.* Oxford, 13 East, 410, 415). The only case in which a new trial has been granted after verdict in a case of *felony* appears to be R. *v.* Scaife and others, 17 Q. B. 238; 2 Den. C. C. 286, in notis. But as to this case, see Reg. *v.* Bertrand, Law Rep., 1 App. Ca. P. C. 520; and Reg. *v.* Murphy, ib. 2 P. C. Ca. 535. It is pointed out in the Report of the Criminal Code Bill Commission (p. 38) that the motion for a new trial in criminal cases "is confined to "such as have either originated "in or have been removed into the "Queen's Bench Division and, as it "seems, to cases of misdemeanor. A "defendant who has been convicted "may move for a new trial in these "cases as in a civil case, but the "decision of the Queen's Bench "Division is final."

(*p*) Hawk. P. C. b. 2, c. 47, s. 11. However, in cases of *misdemeanor* for nonfeasance and such as involve civil liability, though the proceeding is criminal in form, a new trial has been granted after a verdict of acquittal. (See The Queen *v.* Russell, 3 Ell. & Bl. 942; The Queen *v.* Johnson, 2 Ell. & Ell. 613.)

[then for ever quit and discharged of the accusation (*q*). And upon such his *acquittal*,—or upon his discharge for want of prosecution, or upon the bill of indictment not being found by the grand jury (*r*),—he shall be immediately set at large, without payment of any fee to the gaoler (*s*). But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted (*t*). Which conviction, therefore, may accrue two ways, either by his confessing the offence, and pleading guilty; or by his being found so by the verdict of his country.]

The present chapter shall conclude with noticing two circumstances collateral to the prosecution—first, the allowance of the expenses which have been incurred; and, secondly, in case of larceny, the restitution of the goods stolen.

1. And, first, by 7 Geo. IV. c. 64, s. 22 (*u*), the court before whom an indictment for any *felony* is preferred (*x*), is empowered to allow the expenses of the prosecutor and his witnesses (*y*),—with compensation for their trouble

(*q*) The civil law in such case only discharged him from the same accuser, but not from the same accusation. (Ff. 48, 2, 7, s. 2.)

(*r*) Vide sup. p. 363.

(*s*) See 55 Geo. 3, c. 50; 8 & 9 Vict. c. 114; R. *v.* Coles, 8 Q. B. 75.

(*t*) In the Roman republic, when the prisoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was something particularly delicate; not that he was guilty, but that he had not been enough upon his guard; "*parum cavisse videtur.*" (Festus, 325.)

(*u*) This Act repeals the previous enactments contained in 27 Geo. 2, c. 3; 18 Geo. 3, c. 19; 58 Geo. 3, c. 70.

(*x*) See also 7 & 8 Vict. c. 2, s. 1, as to offences committed *on the high seas;* 17 & 18 Vict. c. 104, s. 267, as to offences by *British seamen;* 19 & 20 Vict. c. 16, s. 13, 25 & 26 Vict. c. 65, s. 12, as to prosecutions removed for trial to the *Central Criminal Court;* 32 & 33 Vict. c. 62, s. 17, as to the prosecution of *fraudulent debtors.*

(*y*) By 7 Geo. 4, c. 64, s. 28, and 14 & 15 Vict. c. 55, s. 8, the court may also order compensation to parties who have been active in the *apprehension* of certain offenders. (Vide sup. p. 349.)

and loss of time (*z*); and this whether the case shall terminate in conviction or acquittal, or in the throwing out the bill of indictment (*a*): and by 18 & 19 Vict. c. 126, s. 22, and 42 & 43 Vict. c. 49, s. 28, similar powers are given to justices at petty sessions, in dealing with offences under those Acts, in the exercise of their summary jurisdiction. And, though there is no general provision on this subject with regard to *misdemeanors* prosecuted by indictment, the costs of prosecution are provided for in the same way, in reference to a great variety of cases, by the particular Act under which the misdemeanor is punishable (*b*). Moreover, by 29 & 30 Vict. c. 52 (*c*), it is now further provided, that the justices before whom a prisoner is brought and examined (though no *committal for trial* shall take place thereon) may grant to any witness called and examined, a certificate of his expenses; which expenses are to be allowed out of the county rate: provided always the charge be made *bonâ fide* on reasonable and probable cause. And, finally, by 30 & 31 Vict. c. 35, s. 5, the court before which any person is tried for any felony or misdemeanor may, in its discretion, order that there shall be paid to any witness who was bound over by the examining magistrate to give

(*z*) By 14 & 15 Vict. c. 55, s. 4, the amount of costs and expenses of the prosecutions is placed under the superintendence of the secretary of state; and the costs, being charged in the first instance upon the county rate, (or, in the case of a borough with a separate quarter sessions, on the borough rate,) are repaid by the Treasury to the county (or borough) out of monies provided by parliament. (As to this, see The Queen *v.* The Commissioners of the Treasury, Law Rep., 7 Q. B. 387.)

(*a*) Even if no bill is preferred, the court before whom any person has been summoned to attend by recognizance or subpœna, may compensate him for expenses incurred and trouble and loss of time, either in attending such court or the examining justices. (7 Geo. 4, c. 64, s. 22.)

(*b*) See in particular the following enactments:—10 & 11 Vict. c. 82; 13 & 14 Vict. c. 101; 14 & 15 Vict. c. 55, s. 3; 19 & 20 Vict. c. 16, s. 13; 24 & 25 Vict. c. 96, s. 121; c. 97, s. 77; c. 98, s. 54; c. 99, s. 42; c. 100, s. 77.

(*c*) This Act is temporary only, but has been continued by 42 & 43 Vict. c. 67, to 31st December, 1880.

evidence on behalf of the person accused, a sum of money in reasonable compensation for his expenses, trouble and loss of time, as part of the expenses of the prosecution (*d*).

2. By the common law there was no restitution of goods upon an indictment, because it is at the suit of the Crown only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again (*e*). But afterwards, by statute 21 Hen. VIII. c. 11, where any person was convicted of larceny by the evidence of the party robbed, such party was to have full restitution of his money, goods and chattels,—or the value of them out of the offender's goods (if he had any,)—by a writ to be granted by the justices. And afterwards, it became the practice for the court, upon the conviction of a felon, to order, without any writ, immediate restitution of such goods as were brought into court, to be made to the several prosecutors (*f*). And though the statute of 21 Hen. VIII. is repealed (*g*), a writ or order of restitution may now, in many cases, be issued under the provision of 24 & 25 Vict. c. 96, s. 100 (*h*); which enacts that if any person, guilty of any felony or misdemeanor

(*d*) We may remark here, that costs are also, in other cases, sometimes allowed to *defendants* in criminal proceedings. For by 4 W. & M. c. 18, if the prosecutor, on an information filed by the Master of the Crown office, does not try within a year after issue joined, or if the defendant be acquitted by verdict, or a *nolle prosequi* be entered, the Queen's Bench may award costs to the defendant,—unless the judge before whom it is tried certifies in open court on the trial that there was a reasonable ground for the prosecution. See also 19 & 20 Vict. c. 16, ss. 25, 26; and 25 & 26 Vict. c. 65, s. 12, as to the expense of witnesses for prisoners tried under those Acts.

(*e*) 3 Inst. 242. As to such appeal, vide sup. p. 377.

(*f*) There is no power, either at common law or by statute, for a judge to give any direction as to the disposal of chattels found on a felon, which do *not* belong to the prosecutor. See The Queen *v.* The Corporation of London, 1 Ell. Bl. & Ell. 509.

(*g*) By 7 & 8 Geo. 4, c. 27.

(*h*) Re-enacting 7 & 8 Geo. 4, c. 29, s. 57, repealed by 24 & 25 Vict. c. 95. (See Lindsay *v.* Cundy, Law Rep., 2 Q. B. D. 96.)

mentioned in that Act (*i*), in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of (or in receiving with guilty knowledge) any chattel, money, valuable security, or other property, shall be indicted for the same, by or on behalf of the owner, his executor or administrator, and be convicted thereof,—the property shall be restored to the owner or such his representative; and the court shall have power to award, from time to time, writs of restitution for such property, or to order the restitution thereof in a summary manner (*k*). This, however, is subject to a proviso as to valuable securities, that no restitution shall be awarded if before the award thereof it shall appear that they shall have been *bonâ fide* paid or discharged by some person liable to the payment thereof; —or, where (being negotiable instruments,) they shall have been *bonâ fide* taken by transfer or delivery, by some person for a just and valuable consideration;— provided, that is, such person had no notice or reasonable cause to suspect that they had been stolen, taken, obtained, extorted, embezzled, converted or disposed of by means of any felony or misdemeanor (*l*).

[It is to be observed with respect to restitution after conviction, that it reaches the goods so stolen, notwithstanding the property of them is endeavoured to be altered by sale in a market overt (*m*); a doctrine which, though it may seem somewhat hard on the buyer, yet the rule of

(*i*) An exception, however, is made with regard to prosecutions of *trustees*, *bankers*, and other *agents* for misdemeanors under the Act, in respect of goods or documents of titles entrusted to them. (24 & 25 Vict. c. 96, s. 100.)

(*k*) The Queen's Bench Division has no power in such cases to award a writ or order restitution, which must be obtained from the court convicting the offender. (The Queen *v.* Lord Mayor of London, Law Rep., 4 Q. B. 371.) A similar power is given to the *justices of the peace*, on their dealing summarily with an indictable offence under the provisions contained in the Summary Jurisdiction Act, 1879 (see 42 & 43 Vict. c. 49, s. 27).

(*l*) 24 & 25 Vict. c. 96, s. 100.

(*m*) 1 Hale, P. C. 543; 4 Bl. Com. 363. Even without any award of restitution, the party may peaceably retake his goods wherever he happens to find them, unless a new property have been

[law is, that *spoliatus debet, ante omnia, restitui*: especially when he has used all the diligence in his power to convict the felon. And since the case is reduced to this hard necessity, that either the owner or the buyer must suffer, the law prefers the right of the owner,—who has done a meritorious act by pursuing a felon to condign punishment,—to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction (*n*).] In reference, however, to the above doctrine, notice may be taken of the following provision in the 30 & 31 Vict. c. 35, s. 9,—viz., that where a prisoner has been convicted of any offence which includes the stealing of any property, and it shall appear to the court that the prisoner has sold such property to one who had no knowledge that the same was stolen, it shall be lawful for the court, on the application of such purchaser, and on the restitution of the stolen property to the prosecutor, to order a sum, not exceeding the proceeds of the sale, to be delivered to the purchaser out of any monies which may have been taken from the prisoner on his apprehension. Moreover, by the 33 & 34 Vict. c. 23, ss. 3, 4, the court was enabled to condemn an offender, who has been convicted of treason or felony, (the same statute abolishing the former rule that on such conviction his property was forfeited to the crown,) to pay the costs of the suit (*o*); and also, on the application of any person aggrieved, a sum of money by way of compensation not exceeding 100*l*.

fairly acquired therein. And (under some circumstances) he may bring an action of trover against any one who has bought them. (See White *v.* Spettigue, 13 Mee. & W. 603; Scattergood *v.* Sylvester, 15 Q. B. 506.) He may also (it is said) bring an action against the felon if he is convicted and pardoned. "But such actions lie not before conviction; for so felonies would be made up and healed; and also recaption is unlawful, if done with intention to smother or compound the larceny." (4 Bl. Com. 363.) As to compounding felony, vide sup. p. 269.

(*n*) See the observations in the Report of the Criminal Code Bill Commission, p. 40, as to the doctrine of restitution, in reference to rights of property innocently acquired by a third party.

(*o*) See The Queen *v.* Roberts, Law Rep., 9 Q. B. 77.

CHAPTER XIX.

OF JUDGMENT AND ITS CONSEQUENCES.

We are now to consider the next stage of criminal prosecutions after trial and conviction are past,—which is that of *judgment* (*a*). For when, upon a charge of felony, the jury have, in the presence of the prisoner, brought in their verdict, "guilty," he is either immediately, or at a convenient time soon after, asked by the court, if he has anything to offer why judgment should not be awarded against him. And, upon a charge of misdemeanor, in case the defendant be found guilty in his absence, (as he may be,) a *capias* is thereupon issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry; but no corporal punishment can in any case be awarded against a defendant, unless he be personally present (*b*). But whenever he appears in person, he may at this period offer any exceptions to the indictment, in *arrest of judgment* (*c*): as for

(*a*) Vide sup. p. 340.

(*b*) Hawk. P. C. b. 2, c. 48, s. 17. The defendant must in all cases be personally before the court, in order to move in arrest of judgment. (Com. Dig. Indictment, N.) And to enable him so to move, he must, in capital cases, be asked, before judgment "what he has to say why "judgment of death should not be "pronounced against him." (Ibid.)

(*c*) At this period of the proceedings it was that the prisoner formerly might avoid a judgment of death, by praying the *benefit of clergy;* it being more usual to resort to this, after conviction, than by way of declinatory plea to the indictment (as to which, vide sup. p. 395, n.). This benefit of clergy constituted, in former times, so remarkable a feature in our criminal law, and a general acquaintance with its nature is still so important for the illustration of our books, that it may be desirable to subjoin here some further notice on the subject. It originally consisted, in the privilege allowed to a clerk in orders, when prosecuted in the temporal court, of

some defect apparent on the face of the record; for it is to defects of that kind only, that the motion in arrest of judgment applies (*d*). Formerly, indeed, the judgment

being discharged from thence, and handed over to the Court Christian, in order to make canonical purgation,—that is, to clear himself on his own oath, and that of other persons as his compurgators, (see Hist. Eng. L. by Reeves, vol. 2, pp. 14, 134; 25 Edw. 3, st. 6, c. 4, et sup. bk. v.;) a privilege founded, as it is said, upon the text of Scripture, "Touch "not mine anointed, and do my "prophets no harm." In England, this was extended by degrees to all who could read, and so were capable of becoming clerks; and ultimately allowed by 6 Ann. c. 9, without reference to the ability to read. (Reeves, ubi sup., et vol. 4, p. 156; 2 Inst. 637; 1 Edw. 6, c. 12.) But by 4 Hen. 7, c. 13, it was provided that laymen allowed their clergy should be burned in the hand, and should claim it only once; and as to the clergy,—it became the practice in cases of heinous and notorious guilt, to hand them over to the ordinary *absque purgatione faciendâ*, the effect of which was that they were to be imprisoned for life (4 Bl. Com. 369); although afterwards, by 18 Eliz. c. 7, the delivering over to the ordinary was abolished altogether. As to the nature of the offences to which the benefit of clergy applied, it had no application except in capital felonies; and from the more atrocious of these it had been taken away by various statutes, prior to its entire abolition by 7 & 8 Geo. 4, c. 28, s. 6. As the law stood at the time of that abolition, clerks in orders were, by force of the benefit of clergy, discharged in clergyable felonies without any corporal punishment whatever, and as often as they offended (2 Hale, P. C. 375); the only penalty being a forfeiture of their goods. And the case was the same with peers and peeresses, as regards the first offence; and even after the 7 & 8 Geo. 4, c. 28, doubts were entertained whether the privilege of lords or peers in parliament in this respect did not still exist. This doubt led to the passing of 4 & 5 Vict. c. 22, enacting that, upon conviction for any felony, such persons shall be punishable as any other of her majesty's subjects. As to commoners, also, they could have benefit of clergy only for the first offence; and they were discharged by it from the capital punishment only,—being subject on the other hand, by 3 Geo. 1, c. 11, 6 Geo. 1, c. 23, and 19 Geo. 3, c. 74, not only to forfeiture of goods, but to burning in the hand, whipping (except in manslaughter), fine, and imprisonment, (or, in certain cases, transportation,) in lieu of the capital sentence. See 4 Bl. Com. p. 371.

(*d*) It is to be noticed that it is only in respect of error in law apparent on the record, and with regard to which no question shall have been *reserved* for the consideration of the judges, that any appeal to the Court of Appeal or otherwise, lies from the judgment of the High Court of Justice "in any criminal cause or matter" (see 36 & 37 Vict. c. 66, s. 47; R. *v.* Steel, Law Rep., 2 Q. B. D. 37; The Queen *v.* Fletcher, ib. 43; Blake *v.* Beech, ib. 2 Ex. D. 335).

might be arrested for merely formal defects, as for want of sufficient certainty in setting forth the person, the time, or the place; but now, as we have seen, defects of a merely formal kind are, in some cases, wholly immaterial; and, in none are allowed to be brought forward, except by way of demurrer, or motion to quash the indictment (*e*): so that a motion in arrest of judgment can be now made only in respect of some substantial objection (*f*), and even with regard to some of these the defect is aided by verdict (*g*). Upon such motion, if the objection taken appear to be sufficient, the court will arrest the judgment; that is, abstain from pronouncing any judgment, and discharge the prisoner. But such a result is not, like an acquittal by verdict, an absolute discharge from the matter of accusation, for the party may be indicted again (*h*). By recent legislation, another method also is now provided for protecting a prisoner found guilty by verdict, from having judgment or execution awarded against him, where, in point of law, it ought not to be awarded; for, supposing the trial to be in a court of oyer and terminer, gaol delivery, or quarter sessions, and any question of law to arise on such trial on motion for arrest of judgment, (or even independently of such motion,) which the court finds too difficult for its determination,—it is empowered by 11 & 12 Vict. c. 78, to *reserve* the question; and to state it in the form of a special case for the consideration of the judges (*i*); and

(*e*) Vide sup. p. 398.

(*f*) See Larkin's case, 1 Dears. C. C. R. 365.

(*g*) See Heymann *v.* The Queen, Law Rep., 8 Q. B. 102.

(*h*) See 4 Rep. 45.

(*i*) In the Report of the Criminal Code Bill Commission (p. 37) it is stated, that "up to the year 1848 "it was the practice, if any ques- "tion of law which would not ap- "pear on the record arose at a "criminal trial at the assizes, for "the judge who tried the case to "state the point for the opinion of "all the judges, by whom it was "afterwards considered and deter- "mined, no reasons for the de- "termination being given. If the "judges thought that the convic- "tion was wrong, the person con- "victed was pardoned. There was "no mode of reserving cases which "arose at the Quarter Sessions."

in the meantime to postpone the judgment, or, respite the execution of it, as may be thought fit (*j*).

A *pardon* may not only (as already mentioned) be pleaded on arraignment in bar of the indictment (*k*), but it may also be pleaded after verdict, in arrest of judgment. Yet, certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible.

If all these resources fail, the court must pronounce *judgment* (*l*); by awarding the punishment which the law hath annexed to the crime; and which hath been constantly mentioned, together with the crime itself, in the course of the former chapters; and such judgment ought regularly in all cases to be *recorded* (*m*). The punishment of offences is in some cases governed by the

(*j*) Under the Judicature Act, 1873, this jurisdiction as to "reserved cases" is exercised by the judges of the "High Court of Justice," or by five of them at the least, whereof the "Lord Chief Justice of England," or the "Lord Chief Justice of the Common Pleas," and the "Lord Chief Baron of the Exchequer," or one of such chiefs at least, shall be part (36 & 37 Vict. c. 66, s. 47). It appears that if a difference of opinion occurs between the five judges, it is held that the minority are not bound by the majority, but the matter must be referred to the whole body. (See the Report of the Criminal Code Bill Commission, p. 38.)

(*k*) Vide sup. p. 402.

(*l*) It may be observed that after indictment found and *before judgment*, the attorney general on behalf of the Crown may cause an entry of *nolle prosequi* on the record and thereby stay the proceedings (see the same Report, p. 37).

(*m*) By 4 Geo. 4, c. 48, whenever any person shall be convicted of any capital felony, except *murder*, and the court before whom he is convicted shall be of opinion that, under the particular circumstances of the case, he is a fit subject for the royal mercy, the court may abstain from pronouncing judgment of death, and instead of pronouncing it, only order it to be *recorded*; which, being entered on record, is to have the same effect as if the judgment had been pronounced, and the offender reprieved. By 6 & 7 Will. 4, c. 30, and 7 Will. 4 & 1 Vict. c. 77, s. 3, the above exception was in effect taken away; but both of these last provisions are now (so far as respects the present point) repealed by 24 & 25 Vict. c. 95, and the power of the court (under 24 & 25 Vict. c. 100, s. 2) to cause sentence of death to be *recorded* in cases of murder, appears to be somewhat doubtful. (See Criminal Acts, by Greaves, p. 30; Arch. Pl. & Ev. in Crim. Ca. 15th ed. 534; Rosc. Dig. C. C. 208.)

common law only, but is more frequently defined by statute (*n*). In misdemeanors, it is generally fine or imprisonment or both; in felonies, it is usually imprisonment or penal servitude: the imprisonment being frequently accompanied (both in misdemeanor and felony) with hard labour—to which whipping and solitary confinement, to the extent presently to be mentioned, are also sometimes added (*o*).

In cases punishable at common law, the judge has a discretion whether fine or imprisonment, or both, shall be awarded, and the measure of either is also left to his decision. And where the punishment is fixed by statute, there is also usually reposed in him, in cases of felony, a discretion between imprisonment and penal servitude; and in case both of felony and misdemeanor, (where either of these modes of punishment is adopted,) a power of determining, within certain limits at least, the period of its duration (*p*). The judge, however, cannot inflict for any

(*n*) In the case of a *felony* for which no other punishment is provided, there may, by 7 & 8 Geo. 4, c. 28, s. 8, and 20 & 21 Vict. c. 3, be awarded penal servitude to the extent of seven years, or imprisonment (with or without hard labour, solitary confinement and whipping) to the extent of two years. In case of a *misdemeanor* for which no other punishment is provided, there may be awarded, by the common law, fine and imprisonment at the discretion of the court.

(*o*) The punishment of *whipping* was inflicted, at common law, on persons of inferior condition, who were guilty of petty larceny, and other smaller offences; but it seems that, by the usage of the Star Chamber, it was never to be inflicted on a gentleman (1 Chit. C. L. 796). Blackstone enumerates also (vol. iv. p. 377) the *pillory*, the *stocks*, and the *ducking stool*, as ignominious punishments known to the English law. But the first of these was expressly abolished by 7 Will. 4 & 1 Vict. c. 23, and the two last are disused.

(*p*) Whenever sentence is passed for felony, on a person already imprisoned under sentence for another crime, the court may award imprisonment for the subsequent offence to commence from the expiration of the first imprisonment (7 & 8 Geo. 4, c. 28, s. 10). And where such person is already under sentence either of imprisonment or penal servitude, the court, if empowered to sentence to penal servitude, may award it for the subsequent offence, to commence at the expiration of the first sentence; and this, although the aggregate term of imprisonment or penal servitude, respectively, may exceed the term for which either punishment could otherwise be awarded. (7 & 8 Geo. 4, c. 28,

offence, a punishment not specifically made applicable thereto by the law itself. And by the Bill of Rights (1 W. & M. sess. 2, c. 2) it is declared as one of the antient rights and liberties of the subjects of this realm, that no cruel and unusual punishments are to be inflicted. Some further remarks on those that have been mentioned, may here be material.

[As to *fines*, their *quantum* neither can nor ought to be ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the Twelve Tables at Rome fined every person, who struck another, five-and-twenty denarii: which, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomsoever he pleased, and then tender them the legal forfeiture. Our law, therefore, has not often ascertained the quantity of fines,—directing rather that such or such an offence be punished "by fine" in general, without specifying the certain sum,—which is fully sufficient when we consider that, however unlimited the power of the court may seem, it is far from being wholly arbitrary, but its discretion is regulated by law. For the Bill of Rights,—which, as just mentioned, prohibits cruel and unusual punishments,—also particularly declares that excessive fines shall not be imposed (*q*); and the same statute

s. 10; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.) Moreover, in all cases where the court by any statute is empowered or required to award a sentence of penal servitude exceeding *seven years*, the court may substitute the term of seven years, or else imprisonment, with or without hard labour, to the extent of two years (9 & 10 Vict. c. 24; 20 & 21 Vict. c. 3).

(*q*) When the judges imposed a fine of 30,000*l.* on the Duke of Devonshire, for striking within the limits of one of his majesty's palaces, the house of lords declared that their conduct was oppressive and illegal. (11 Harg. St. Tr. 136; and see as to Oates's case, 4 Harg. St. Tr. 106.)

[further declares, that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void,—a doctrine held long before: since thereby many times undue means and more violent prosecution would be used for private lucre, than the quiet and just proceeding of law would permit (*r*).

The reasonableness of fines in criminal cases has also been usually regulated by the determination of *Magna Charta*, c. 14, concerning amercements for misbehaviour by the suitors in matters of civil right. "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti, salvo contenemento suo; et mercator eodem modo, salvâ mercandisâ suâ; et villanus eodem modo amercietur, salvo wainagio suo.*" A rule that obtained even in Henry the second's time (*s*); and means only that no man shall have a larger amercement imposed upon him than his circumstances or estate will bear; saving to the landowner his contenement or land (*t*); to the trader his merchandize: and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the Great Charter also directs, that the amercement, which is always inflicted in general terms ("*sit in misericordiâ*"), shall be set, *ponatur*, or reduced to a certainty, by the oath of good and lawful men of the neighbourhood. Which method of liquidating the amercement to a precise sum, was usually performed in the superior courts (*u*) by the assessment or *affeerment*

(*r*) 2 Inst. 48.

(*s*) Glanv. b. 9, c. 8, s. 11.

(*t*) Lord Coke says, "that *contenement* signifieth his *countenance*, as the armour of a soldier is his countenance, the books of a scholar his countenance, and the like."—(2 Inst. 28.) He adds, that "the *wainagium* is the countenance of the villain; and it was great reason to save his wainage, for otherwise the miserable creature was to carry the burthen on his back."

(*u*) In the court leet and court baron it was performed by *affeerors*, or suitors sworn to *affeere;* that is, tax and moderate the general amercement, according to the particular circumstances of the offence and the offender. The affeeror's oath is conceived in the very terms

[of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the statute of Westm. 1, c. 18; and then the judges estreated the amount into the Exchequer (*x*). Amercements imposed by the superior courts on their own officers and ministers, were affeered by the judges themselves; but when a pecuniary mulct was inflicted by them on a stranger to, or person not being an officer of, the court (*y*), it was then denominated a *fine;* and the antient practice was, when any such fine was imposed, to inquire by a jury, "*quantum inde regi dare valeat per annum, salvâ sustentatione suâ, et uxoris, et liberorum suorum*" (*z*). And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay without touching the implements of his livelihood; but to inflict corporal punishment, or a limited imprisonment, instead of such fine as might amount to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms; because the penalty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine (*a*); according to an antient maxim, *qui non habet in crumenâ luat in corpore.* Yet, where any statute speaks of both fine and ransom, it is holden that the ransom shall be treble the fine at least (*b*).]

As to *imprisonment* (*c*), its measure, when imposed

of *Magna Charta*. As to which, Blackstone (vol. iv. p. 380) cites Fitz. Survey, c. 11.

(*x*) F. N. B. 76.

(*y*) 8 Rep. 40. The words of Blackstone are—"a stranger, not "being party to any suit"—(4 Bl. Com. 380); but Lord Coke says, "a stranger to the court."

(*z*) Gilb. Excheq. c. 5.

(*a*) Mirrour, c. 5, s. 3; Lamb. Eirenarch. 575.

(*b*) Norton's case, Dyer, 232.

(*c*) It may be observed, that offenders under the age of *sixteen*, convicted before any court, magistrate, or justice of the peace, and whose sentence shall include imprisonment for, at the least, ten days,—may be ordered to be detained, after the period of imprisonment, in a certified *reformatory school* for not less than two nor more than five years; but if the offender be under the age of *ten*, he must have been previously charged

under modern Acts of parliament as a punishment for crime, is now usually limited so as not to exceed two years (*d*); and, in connection with it, the sentence frequently inflicts the additional severity of *solitary confinement*, or of *hard labour*, or both, according to the nature of the case (*e*). But the 7 Will. IV. & 1 Vict. c. 90, s. 5, contains a general provision, that it shall not be lawful to direct an offender to be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year; and a similar limitation is inserted in each of the Criminal Consolidation Acts of 1861 (viz. 24 & 25 Vict. cc. 96, 97, 98, 99, 100), in reference to the offences punishable under those statutes respectively. As to hard labour, regulations respecting its nature and severity have been made, under which it is divided into two classes; one for the employment of males above the age of sixteen, the other of males below that age and of females (*f*).

As to *whipping*, the offender, under such modern Acts of parliament as authorize this punishment, may be directed to be whipped in addition to any imprisonment awarded. By 1 Geo. IV. c. 57, however, it was provided that judgment shall in no case be given that any *female*

with some offence punishable with penal servitude, or imprisonment, or be sentenced by a judge of assize or court of general or quarter sessions. (As to these schools, see 29 & 30 Vict. c. 117.) See also 25 & 26 Vict. c. 44; 28 & 29 Vict. c. 126, ss. 41—43, and 40 & 41 Vict. c. 21, s. 29, enabling pecuniary relief, in certain cases, to be afforded to prisoners on leaving prison, either directly or through the medium of a certified *Prisoners' Aid Society or Refuge*.

(*d*) See 24 & 25 Vict. cc. 96, 97, 98, 99, 100, *passim*. By some earlier statutes, however, still unrepealed, the periods of imprisonment authorized for offences under their provisions are sometimes three and even four years.

(*e*) The punishment of *hard labour* is said to have been first introduced by 6 Ann. c. 9. (See R. *v.* Baker, 7 A. & E. 502.) Hard labour may now be added, in most cases, to the sentence of imprisonment. (See 24 & 25 Vict. cc. 96, 97, 98, 99, 100, *passim*.)

(*f*) See 28 & 29 Vict. c. 126, 19, and Part IV. sched. I. reg. 34—38. And see also 40 & 41 Vict.

convicted of any offence shall be whipped either publicly or privately: and in cases where the whipping of female offenders had, before that Act, formed either a part or the whole of the sentence,—the court before which the trial is had was empowered to pass sentence of confinement with hard labour in the common gaol or house of correction, for any time not exceeding six months, nor less than one month; (or of solitary confinement therein, for any space not exceeding seven days at any one time;) *in lieu* of the sentence of being publicly or privately whipped. Moreover, by the Criminal Consolidation Acts of 1861, already so often referred to, the addition of whipping by them authorized in reference to a variety of the offences therein mentioned, is uniformly confined to such males as are below the age of *sixteen* (*g*); and the whipping is to be in private and only to be inflicted *once;* and the number of strokes and the instrument with which they are to be inflicted are to be specified by the court in the sentence. And a similar provision was made by 25 & 26 Vict. c. 18, in reference to this punishment when awarded by a Court of *Summary Jurisdiction*—with the addition, that in case of an offender whose age does not exceed fourteen years, the number of strokes inflicted shall not exceed twelve, and the instrument used shall be a birch rod (*h*). On the other hand, when the sentence of whipping is inflicted under the 26 & 27 Vict. c. 44, an Act passed in the year 1863 "for the further security of the persons of her

c. 21, s. 37, enabling the secretary of state to relax the rules laid down in the previous Act, as to the nature of the labour. See also 42 & 43 Vict. c. 49, s. 4, in reference to the remission of hard labour in cases disposed of by way of summary conviction.

(*g*) See 24 & 25 Vict. cc. 96, 97, 98, 99, 100, *passim*. In one instance (24 & 25 Vict. c. 96, s. 101), the age mentioned is *eighteen;* but this is probably a clerical error.

(*h*) This Act is not in terms referred to in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), but that statute limits the number of strokes with a birch rod in the case of a child under the age of fourteen to *six*, and makes, moreover, additional regulations with regard to the manner in which the sentence is to be carried out (vide sup. p. 327).

Majesty's subjects from personal violence" (*i*), the punishment may be ordered to be repeated twice or even thrice; and there is no limitation as to the age of the person to be so punished; though if his age does not exceed sixteen, the number of strokes at each infliction is not to exceed twenty-five, and to be with a birch rod; and in the case of older offenders the number of strokes, at each whipping, is not to exceed fifty. Moreover, in every case, the sentence is to specify the number of strokes and the instrument to be used. And no whipping is to take place after the expiration of six months from the passing of the sentence.

As to *penal servitude*, this is a sentence which has been in our own days introduced in substitution for that of *transportation beyond the seas* (*k*). The principal statute in reference to punishment by way of "transportation" is the 5 Geo. IV. c. 84, by which the law on that subject was revised and consolidated in the year 1824 (*l*). Under that Act, the sovereign was enabled to appoint places beyond the seas, either within or without the dominions of the Crown, to which offenders under sentence of transportation might be conveyed and kept to hard labour; and also places, in England and Wales, for their confinement until transported or discharged, or otherwise disposed of by the secretary of state. But great difficulty having arisen, of late years, in finding colonies willing to receive transported convicts, it became gradually the practice, as to certain classes of convicts who had been sentenced to

(*i*) As to this Act, vide sup. pp. 82, 132.

(*k*) Transportation is said (Barr. on Statutes, 352) to have been first inflicted as a punishment by 39 Eliz. c. 4. As to its history, see R. *v.* Baker, 7 A. & E. 502; Bullock *v.* Dodds, 2 B. & Ald. 262, 267; Whitehead *v.* The Queen, 7 Q. B. 532.

(*l*) This Act has been amended by 6 Geo. 4, c. 69; 11 Geo. 4 & 1 Will. 4, c. 39; 2 & 3 Will. 4, c. 62; 4 & 5 Will. 4, c. 65; 7 Will. 4 & 1 Vict. c. 90; 6 & 7 Vict. c. 7; 10 & 11 Vict. c. 67; 16 & 17 Vict. c. 99, s. 7; 20 & 21 Vict. c. 3; 22 Vict. c. 25; and 39 & 40 Vict. c. 42.

transportation, to detain them in the mother-country for the whole period of their term of punishment; and it was ultimately thought expedient to abolish the sentence of "transportation" altogether, and to substitute for it that of "penal servitude;" under which convicts may be subjected to such confinement and discipline (either at home or abroad) as shall be found practicable and desirable (*m*).

This change was accordingly carried into effect by the "Penal Servitude Acts," that is to say, by 16 & 17 Vict. c. 99, 20 & 21 Vict. c. 3, 27 & 28 Vict. c. 47, and 42 & 43 Vict. c. 55, by which (after providing that no person shall for the future be sentenced to transportation) it is enacted that any persons who, if those Acts had not passed, might have been so sentenced, shall be liable to be sentenced to be kept in *penal servitude* for a term of the same duration; and further, that any person who might have been sentenced *either* to transportation or imprisonment, may be sentenced either to penal servitude or to imprisonment (*n*). This was so laid down by 20 & 21 Vict. c. 3, which also provided that wherever, under the former law, seven years transportation might have been awarded, penal servitude for *three* years might be substituted. But, as to this, a further alteration of the law was made by the 27 & 28 Vict. c. 47, viz.: that no person shall, in any case, be sentenced to penal servitude for a shorter period than *five* years. This same Act contained also a provision that if the offender had been previously convicted of felony, the least period of sentence by way of penal servitude which could be inflicted was *seven* years (*o*); but this restriction is now removed by 42 & 43 Vict. c. 55.

It was moreover provided by the Penal Servitude Acts,

(*m*) See the Evidence of Mr. Waddington, before the select committee of the House of Commons, on Transportation. (Second Report, p. 3.)

(*n*) 20 & 21 Vict. c. 3, s. 6.

(*o*) See The Queen *v.* Willis, Law Rep., 1 C. C. 363; Same *v.* Deane, ib. 2 Q. B. D. 305.

that every person sentenced to this punishment may be kept either in any prison or place of confinement in the united kingdom, or in any river, port or harbour thereof,—or else in some place in her Majesty's dominions beyond the seas, duly appointed for such purpose by order in council,—according as the secretary of state shall from time to time direct (*p*); and may, while under confinement, be kept to hard labour and otherwise treated, in like manner as persons sentenced to transportation might formerly be dealt with (*q*).

By the same Acts it was also made lawful for her Majesty (*r*), by order in writing, under the hand and seal of the secretary of state, to grant to any convict under sentence of penal servitude or of imprisonment, a *licence to be at large* during such portion of his term, and on such conditions in all respects as to her Majesty shall seem fit (*s*). But such licence may be revoked or altered at pleasure; and will *ipso facto* be forfeited if the holder shall be subsequently convicted of any indictable offence, or if he shall fail to report himself (*t*) to the proper officer once in every month, or to give due notice (that is to say,

(*p*) The convict prisons at present in use in England are mentioned sup. vol. III. p. 128.

(*q*) 16 & 17 Vict. c. 99, s. 6; 20 & 21 Vict. c. 3, s. 3.

(*r*) See 16 & 17 Vict. c. 99, s. 9; 20 & 21 Vict. c. 3, s. 5; 27 & 28 Vict. c. 47, ss. 4—10. The Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), amended by 39 & 40 Vict. c. 23, and 42 & 43 Vict. c. 55, also contains provisions with regard to the holders of licences to be at large. It is also to be noticed, that a prisoner who has been sentenced to penal servitude, is informed by the authorities on arriving at his destination, that he will, by a regular course of industry while undergoing his sentence, be enabled to obtain his liberty under a "licence to be at large," before the expiration of the period for which he has been sentenced,—the time varying according to the number of years for which he has been sentenced. But if he has been sentenced to penal servitude *for life*, no remission can take place but by order of the secretary of state.

(*s*) 16 & 17 Vict. c. 99, s. 9. And see 34 & 35 Vict. c. 112, s. 5.

(*t*) The report must be either *personally* or *by letter* in accordance with the directions given by the chief officer of the police of the district (sect. 5).

by personally presenting himself and declaring the same) of any change of residence (*u*); and if it be so revoked or forfeited, the convict may be sent back to the prison from which he was released by virtue of his licence, or be placed in any other prison wherein convicts under sentence of penal servitude may be lawfully confined (*x*). And we may notice here, that, with the object of more effectually preventing crime, a *register* of criminals has been established; and their photographs directed to be taken and distributed so as to facilitate their identification (*y*).

It may be, also, here remarked, that it forms one of the provisions of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), that where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, the court may, in addition to any other punishment, direct that he shall be subject to the *supervision of the police* for a period not exceeding seven years, commencing immediately after the expiration of the sentence passed on him for the last of such crimes; and that any person, subject to such supervision, who shall remain in any place for forty-eight hours without notifying the place of his residence to the chief officer of police for the district, or who shall fail to comply with the requisitions of the Act in periodically reporting himself to such chief officer, shall, unless he can show that he did his best to act in conformity to the law, be liable to be imprisoned, with or without hard labour, for any period not exceeding one year (*z*).

(*u*) See 27 & 28 Vict. c. 47, s. 4; 34 & 35 Vict. c. 112, s. 5; 42 & 43 Vict. c. 55, s. 2.

(*x*) 16 & 17 Vict. c. 99, ss. 10, 11; 20 & 21 Vict. c. 3, s. 5; 27 & 28 Vict. c. 47, s. 9; 34 & 35 Vict. c. 112, s. 5.

(*y*) 34 & 35 Vict. c. 112, ss. 5, 8. These enactments as to photographs extended to *all* persons convicted of crime, but this leading to unnecessary expense, it was subsequently (by 39 & 40 Vict. c. 23) provided that the secretary of state might from time to time by order prescribe the classes of criminals to which they should apply.

(*z*) 34 & 35 Vict. c. 112, s. 8; and see 42 & 43 Vict. c. 55, s. 2.

When sentence of *death*, the most terrible judgment in the laws of England, is pronounced, the mode in which it is to take place is particularized in the sentence itself, and this is always that the prisoner be hanged by the neck till dead; a mode of capital punishment that has been in use in this country from time immemorial (*a*).

[Upon the passing of this sentence, the immediate and inseparable consequence at common law was *attainder*. For when it was thus made clear beyond all dispute that the criminal was no longer fit to live upon the earth, but was to be exterminated as a monster, and a bane to human society, the law set a note of infamy upon him; called him attaint, *attinctus*, stained or blackened: withdrew from him in general all civil rights (*b*); and considered him, by an anticipation of his punishment, as already dead in law (*c*). But none of these consequences arose until after *judgment;* for there was a great difference between a man *convicted* and one *attainted*—though they were frequently through inaccuracy confounded together. After conviction only, a man was liable to none of these disabilities; for there was still, in contemplation of law, a possibility of his innocence, as something might be offered in arrest of judgment. But when judgment was once pronounced, both law and fact conspired to prove him completely guilty; and there was not the remotest possibility left of any thing to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commenced (*d*):—or upon such circumstances as were equivalent to judgment of death,—such as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice; which tacitly confesses the guilt.] And, therefore, either upon judgment of outlawry, or

(*a*) 2 Hale, P. C. 399; Hawk. P. C. b. 2, c. 48, s. 7.

(*b*) As to the capacity of a person attainted to contract a legal marriage, see Kynnaird *v.* Leslie, Law Rep., 1 C. P. 389.

(*c*) 3 Inst. 213.

(*d*) R. *v.* Bridger, 1 Mee. & W. 145.

of death, for a capital crime, a man was said to be attainted.

Among the consequences of attainder were, formerly, *forfeiture* and *corruption of blood.*

Forfeiture upon attainder accrued, in the first place, in the crime of treason. And here the criminal forfeited for ever to the Crown all his freehold lands and tenements of inheritance, whether held in fee simple or fee tail; and, also, all his rights of entry on freehold lands and tenements which he had at the time of the offence committed, or at any time afterwards: and, further, the profits of all freehold land and tenements which he had in his own right for life or years, so long as such interest should subsist (*e*).

This forfeiture related backwards to the time of the treason committed: so as to avoid all intermediate sales and incumbrances, but not those which had taken place before the crime (*f*); and therefore a wife's jointure was not forfeitable for the treason of her husband, because settled on her previous to the treason committed; but her dower was forfeited by the express provision of statute 5 & 6 Edw. VI. c. 11 (*g*); though the husband was held entitled to be tenant by the curtesy of the wife's lands, if the wife were attainted of treason; for that was not provided against by the statute (*h*). But though after attainder the forfeiture related back to the time of the treason committed, yet it did not take effect unless an attainder were had, of which it was one of the fruits; and therefore if a traitor died before judgment pronounced, or was killed in open rebellion, or hanged by

(*e*) Co. Litt. 392; 3 Inst. 19; 1 Hale, P. C. 240; Hawk. P. C. b. 2, c. 49.

(*f*) 3 Inst. 211.

(*g*) Counterfeiting the coin of the realm was formerly treason; but by some of the statutes constituting the offence, 5 Eliz. c. 11, 18 Eliz. c. 1, 8 & 9 Will. 3, c. 26, 15 Geo. 2, c. 28, it was provided, that it should work no forfeiture of lands except for the life of the offender; and by all, that it should not deprive the wife of her dower.

(*h*) 1 Hale, P. C. 359.

martial law, it worked no forfeiture of his lands, for he never was attainted of treason (*i*).

With us in England forfeiture for treason was by no means derived from the feudal policy, but was antecedent to the establishment of that system in this island, being transmitted from our Saxon ancestors, and forming a part of the antient Scandinavian constitution.

In support of the doctrine of forfeiture being based on natural justice, it has been argued that so far as treason is concerned,—he who violates the fundamental principles of government, and breaks his part of the original contract between king and people, must be held to have abandoned his connections with society, and no longer to have any right to those advantages which before belonged to him

(*i*) See Co. Litt. 13; 4 Rep. 57. It was enacted by 7 Ann. c. 21, that after the decease of the then Pretender no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor himself. The history of this matter is somewhat singular, and worthy of observation. Blackstone's account of it (vol. iv. p. 384) is as follows: "At the time "of the Union, the crime of "treason in Scotland was, by the "Scots law, in many respects "different from that in England; "and particularly in its conse- "quence of forfeitures of entailed "estates, which was more pecu- "liarly English; yet it seemed "necessary that a crime so nearly "affecting government should, "both in its essence and conse- "quences, be put upon the same "footing in both parts of the "united kingdom. In new model- "ling these laws, the Scotch na- "tion and the English house of "commons struggled hard, partly "to maintain, and partly to ac- "quire, a total immunity from "forfeiture and corruption of "blood; which the house of lords "as firmly resisted. At length a "compromise was agreed to, which "is established by this statute, "viz. that the same crimes, and "no other, should be treason in "Scotland that are so in England; "and that the English forfeitures "and corruption of blood should "take place in Scotland till the "death of the then Pretender, "and then cease throughout the "whole of Great Britain; the "lords artfully proposing this "temporary clause in hopes, it is "said, that the prudence of suc- "ceeding parliaments would make "it perpetual." (See Burnet's Hist. A.D. 1709; and "Considera- tions on the Law of Forfeiture," vol. i. p. 244.) This was partly done by the statute 17 Geo. 2, c. 39, made in the year preceding the rebellion of 1745. And by 39 Geo. 3, c. 93, the above-mentioned provision of the stat. 7 Ann. c. 21, was repealed.

purely as a member of the community; among which social advantages the right of transferring or transmitting property to others, is one of the chief. [Such forfeitures, moreover, whereby his posterity must suffer as well as himself, must be calculated to restrain a man, not only by the sense of his duty and dread of personal punishment, but also by his passions and natural affections; and should interest every dependent and relation, to keep him from offending: according to that sentiment of Cicero, "*nec vero me fugit quam sit acerbum, parentum scelera filiorum pœnis lui; sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet*" (*k*). And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for despising the power of the tyrants, his old age and his want of children; for children are pledges to the prince of the father's obedience (*l*). Yet many nations (even in antient times) have thought that this posthumous punishment savours of hardship to the innocent, especially for crimes that do not strike at the very root and foundations of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius, in every other instance but that of treason, thought it more just, "*ibi esse pœnam, ubi et noxa est;*" and ordered that "*peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum*" (*m*). And Justinian, also, made a law to restrain the punishment of relations (*n*); which directs the forfeiture to go, except in the case of *crimen majestatis*, to the next of kin to the delinquent. On the other hand, the Macedonian laws extended even the capital punishment of treason, not only to the children, but to all the relations of the traitor (*o*); and of course their estates must also be forfeited, as no man was left to inherit them. And in

(*k*) Ad Brutum, ep. 12.
(*l*) Gravin. 1, s. 68.
(*m*) Cod. 9, 47, 22.
(*n*) Nov. 134, c. 13.
(*o*) Qu. Curt. l. 6.

[Germany, by the famous golden bulle (*p*), copied almost *verbatim* from Justinian's code (*q*), the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's *particular bounty*. But they are therein deprived of all their effects and rights of succession, and are rendered incapable of any honour, ecclesiastical or civil, "to the end that, being always poor and neces-"sitous, they may for ever be accompanied by the infamy "of their father; may languish in continual indigence; "and may find," says this merciless edict, "their punish-"ment in living, and their relief in dying."]

The law of this country as to attainder for *murder*, was somewhat different from attainder in the case of high treason. In murder, the offender forfeited only to the Crown the profits of his freehold estates during life, and also (in the case of lands held by him in fee simple, though not with regard to those held in tail) the lands themselves, for a year and a day, with power to the Crown of committing upon them what waste it pleased: and subject to this temporary forfeiture, the lands escheated to the lord of the fee. This antient doctrine as to the right of the Crown for a year and a day requires, however, some further explanation (*r*). [Formerly, then, the sovereign had a liberty of committing waste on the lands of *all* felons by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods (*s*). But this tending greatly to the prejudice of the public, it was agreed in the reign of Henry the first, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit (*t*). And, therefore, *Magna Charta* provided that

(*p*) Cap. 24.

(*q*) L. 9, t. 8, l. 5.

(*r*) 2 Inst. 37.

(*s*) A punishment of a similar spirit (adds Blackstone, vol. iv. p. 385) appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus, in the books of Daniel and Ezra, which, besides the pain of death inflicted on the delinquents there specified, ordain "that their houses shall be made a dunghill." (Dan. c. iii. 29; Ezra, c. vi. 11.)

(*t*) Mirr. c. 4, s. 16; Flet. l. 1, c. 28.

[the king should only hold such lands for a year and a day, and then restore them to the lord of the fee, without any mention made of waste (*u*). But the statute 17 Edw. II., *De prærogativâ regis*, seemed to suppose that the king should have his year, day *and* waste, and not the year and day *instead of* waste; which Sir Edward Coke, and the author of the Mirrour before him, very justly looked upon as an encroachment, though a very antient one, of the royal prerogative (*x*).] Such continued to be the state of the law on this subject in respect of felonies, generally, until the passing of the 54 Geo. III. c. 145, though it became the practice to compound for the year, day and waste, in order to prevent the Crown from exercising its right of entry. But by the statute just mentioned it was enacted, that no future attainder for felony (except in cases of *treason* or *murder*) should extend to the disinheritance of any heir, or to the prejudice of the right or title of any person other than the right or title of the offender during his life only; and that it should be lawful for every person to whom the right or interest of any lands, tenements or hereditaments after the death of such offender should or might have appertained if no such attainder had been, to enter into the same, the attainder notwithstanding; and such remained the law until the 33 & 34 Vict. c. 23 (The Felony Act, 1870), took away altogether from a judgment for treason or any felony, the effect of causing an attainder.

The forfeitures above mentioned all arose, it will be observed, only as consequences of attainder (*y*); and therefore a *felo de se* forfeited no lands of inheritance or freehold, for he could never be attainted though found to be a felon (*z*). But, on the other hand, they related back to the time of the offence committed, so as to avoid all intermediate charges and conveyances.

(*u*) 25 Edw. 1, c. 22.
(*x*) Mirr. c. 5, s. 2; 2 Inst. 37.
(*y*) R. *v.* Bridges, 1 Mee. & W. 145.
(*z*) 3 Inst. 55. See Norris *v.* Chambers, 30 L. J., Ch. 290.

Another consequence of attainder in treason and murder was *corruption of blood*, both upwards and downwards (*a*); so that an attainted person could neither inherit lands or other hereditaments from his ancestors, nor *transmit* them by descent to any heir; but the same escheated to the lord of the fee, subject to the Crown's superior right of forfeiture. But having had occasion to enlarge on this matter in a former volume, where the subject of *escheat* was in question, it is not necessary to detain the reader longer upon it in this place (*b*),—further than to remind him that by the Felony Act just mentioned, it was also provided that no judgment for any treason or felony shall henceforth cause any corruption of blood (*c*).

In addition to the forfeitures peculiar to attainder, it is to be understood that forfeiture of *goods and chattels* (both real and personal) ensued not only on attainder, but on *conviction* for a felony of any kind, whether capital or otherwise (*d*). [For *flight* also, on an accusation of treason or felony, whether the party were found guilty or acquitted, if the jury found the flight, the party forfeited his goods and chattels; for the very flight was held an offence carrying with it a strong presumption of guilt, and at least an endeavour to elude and stifle the course of justice prescribed by the law. But in modern times it became unusual for the jury to find the flight; forfeiture being looked upon, since the vast increase of personal property of late years, as too large a penalty for an offence to which a man is prompted by the natural love of liberty (*e*).] And by statute 7 & 8 Geo. IV. c. 28, s. 5, it was expressly enacted, that the jury impanelled to try

(*a*) See Kynnaird *v.* Leslie, Law Rep., 1 C. P. 389.

(*b*) Vide sup. vol. I. p. 439 et seq.

(*c*) Vide sup. vol. I. p. 443.

(*d*) Forfeiture of *goods and chattels* accrued, consequently, on a verdict of *self-murder* (vide sup. p. 60).

(*e*) Staundf. P. C. 183 b; 4 Bl. Com. 387.

a person indicted for treason or felony should no longer be charged to inquire whether he fled for such treason or felony.

To revert to the forfeitures which formerly took place on attainder, and those which accrued on conviction merely, some remarkable differences will be noticed between the two. 1. Lands were forfeited upon attainder, but goods and chattels by *conviction* merely (*f*): and this, because, as in many convictions for felony, there never was any attainder; therefore, in those cases, the forfeiture must have been upon conviction, or not at all; and, being necessarily upon conviction in those, it was so ordered in all other cases; the law loving uniformity. 2. In outlawries for treason or felony, lands were not forfeited till the judgment of outlawry; but his goods and chattels were forfeited as soon as a man was first put into the *exigent*, without waiting till he was *quinto exactus*, or finally outlawed; for the secreting himself so long from justice was construed a flight in law (*g*). 3. [The forfeiture of lands had relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture of goods and chattels had no relation backwards; so that those only which a man actually had at the time of conviction were forfeited. Therefore a traitor or felon might *bonâ fide* sell any of his chattels (real or personal), for the sustenance of himself and family between the fact and conviction (*h*); for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could have been safe if he had been held liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if they were collusively and not *bonâ fide* parted with, but merely to defraud the Crown, the law, and particularly

(*f*) See Roberts *v.* Walker, 1 Russ. & Myl. 756.

(*g*) 3 Inst. 232.

(*h*) Hawk. P. C. b. 2, c. 49, s. 33.

[the statute 13 Eliz. c. 5, was strong enough to reach them; for, under such circumstances, they were all the while truly and substantially the goods of the offender.]

The doctrines relating to forfeiture for crime, of which some account has been thus presented, are still deserving of attention from the student; but their practical importance is now greatly lessened, by the sweeping change which was introduced in the year 1870, by the 33 & 34 Vict. c. 23, to which we have already found occasion to make frequent reference. It will be remembered that by that Act it is provided that thenceforth no confession, verdict, inquest, conviction or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat (*i*). But, instead of these consequences, the Act proceeds to provide that a conviction for treason or felony, followed by a sentence of death or penal servitude or any term of imprisonment with hard labour exceeding twelve months, shall disqualify the person convicted, to hold or retain any military, naval or civil office under the Crown, or other public employment; or any ecclesiastical benefice, or any place, office or emolument in any university or other corporation; or to retain any pension or superannuation allowance;—unless in the case of his receiving a free pardon from her Majesty within two months after conviction (*k*). And the same statute further provides that the property of the convict may be committed to the custody and management of *administrators*, to be appointed by the Crown: or (in default of such appointment) to the management of *interim curators;* who may be appointed by the justices of the peace, on an application made in the interest of the convict or his family. And that such administrators or curators are to pay his debts and liabilities, and support his

(*i*) 33 & 34 Vict. c. 23, s. 1.

(*k*) Sect. 2. The convicted felon is also made incapable of being elected or sitting or voting as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise. (Ibid.)

family; and shall preserve the residue of his property for the convict himself or his representatives, on the completion of his punishment, or on his pardon, or death (*l*). It is however to be noted, that the above Act expressly excludes from its operation the law of forfeiture consequent upon *outlawry* (*m*); and therefore the antient consequences of a judgment of outlawry on a charge of treason or felony would seem to be still in force, though, as elsewhere pointed out, process of outlawry itself, may be said to be practically obsolete (*n*).

(*l*) 33 & 34 Vict. c. 23, ss. 9, 18.
(*m*) Sect. 1.
(*n*) Vide sup. p. 381.

CHAPTER XX.

OF REVERSAL OF JUDGMENT.

We are next to consider how a judgment may be avoided (*a*). There are two ways of doing this; either by reversing the judgment, or else by reprieve or pardon.

And in the first place, a judgment may be set aside, reversed or falsified without error brought, [for matters foreign to or *dehors* the record, that is, not apparent upon the face of it, so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore, if the whole record be not certified, or not truly certified by the inferior court, the party injured thereby may allege a diminution of the record, and cause it to be rectified. Thus, if any judgment be given by persons who had no good commission to proceed against the person condemned, it is void; and may be falsified by showing the special matter. As, where a commission issues to A. and B. and twelve others, or any two of them, of which A. or B. shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence of either A. or B.; in this case all proceedings, trials, convictions and judgments against any person are void for want of a proper authority in the commissioners, and may be] falsified and set aside accordingly on proof of the fact,—it being a high misdemeanor in the judges so proceeding, and little, (if anything,) short of murder in them all, in case any person on such a judgment should be condemned to suffer death (*b*).

(*a*) Vide sup. p. 340.

(*b*) Hawk. P. C. b. 3, c. 50, ss. 2, 3; 4 Bl. Com. p. 391.

Secondly, a judgment had in an inferior court of criminal jurisdiction may be reversed on error, brought in the Queen's Bench division of the High Court of Justice (*c*); for notorious and substantial mistakes in the judgment or other parts of the record; as, by way of example, if a man found guilty of the misdemeanor of perjury shall be adjudged a felon (*d*); or, again, where in an indictment for publishing an obscene book, the words alleged to be obscene are omitted (*e*). But as for merely *formal* defects, it has been provided (as we have seen), that all such shall be either immaterial, or, when still ground for objection, shall at least be brought forward by demurrer or motion to quash the indictment, so as to be amended forthwith by the order of the court (*f*). It is also to be observed, that proceedings in error are never allowed to be brought as of course; but only on sufficient probable cause shown to the attorney-general (*g*): whose *fiat* (or permission) is then understood to be grantable of common right, and *ex debito justitiæ* (*h*). And by 8 & 9 Vict.

(*c*) If the sentence appears to be erroneous, but the indictment valid, the prisoner must be discharged. (R. *v.* Bourne, 7 A. & E. 58.) As to error brought for the purpose of compromising a prosecution, see Alleyne's case, 1 Dearsley's C. C. R. 505; 4 Ell. & Bl. 186.

(*d*) 4 Bl. Com. p. 391.

(*e*) See Bradlaugh *v.* The Queen, Law Rep., 3 Q. B. D. 607.

(*f*) Vide sup. p. 398.

(*g*) See Ex parte Lees, 1 Ell. Bl. & Ell. 828; and Castro *v.* Murray, Law Rep., 10 Exch. 213.

(*h*) See 1 Vern. 170, 175; Ex parte Newton, 4 Ell. & Bl. 869; Mansell *v.* The Queen, 8 Ell. & Bl. 54. With regard to proceedings in error, it is remarked in the Report of the Criminal Code Bill Commission (p. 37), that they are those "by which the Queen's Bench division of the High Court is called upon to reverse a judgment, on the ground that errors appear on the record—a writ of error being only granted on the Attorney-General's fiat. An appeal lies ultimately to the House of Lords. The record, however, is so drawn up that many matters by which a prisoner might be prejudiced, indeed the matters by which he would most likely be prejudiced, would not appear upon it; for instance, the improper reception or rejection of evidence, or a misdirection by the judge, would not appear upon the record. This remedy, therefore, only applies to questions of law, and only to that very small number of legal questions which concern the

c. 68—amended by 9 & 10 Vict. c. 24, and 16 & 17 Vict. c. 32,—where judgment shall have been given against a defendant indicted for a misdemeanor, and he shall have obtained leave to bring error, execution thereon shall be stayed, and the defendant discharged from imprisonment until such writ of error shall be finally determined; but this is subject to a proviso, that no execution shall be stayed, nor discharge take place, until the defendant shall be bound by recognizance, (with two sufficient sureties,) to prosecute the writ of error with effect, and personally to appear in court on the day on which judgment thereon shall be given; and, in case the judgment be affirmed, forthwith to render himself to prison according to the judgment (*i*).

When the judgment is reversed upon a writ of error in any criminal case, the statute 11 & 12 Vict. c. 78, s. 5, provides that it shall be competent to the court of error either to pronounce the proper judgment itself, or to remit the record to the court below, in order that that court may pronounce the proper judgment (*k*). And if the judgment be affirmed, or the writ quashed, then by 16 & 17 Vict. c. 32, s. 4, the court may forthwith commit the plaintiff in error to prison, if then present in court: or if he be not present, then by sect. 5 of the same Act, on its being made to appear to a judge that the recognizances have been estreated, and that default has been made for the space of four days in rendering him to prison,—such judge may issue his warrant for his apprehension.

[The effect of reversing a judgment of *outlawry* is,

"regularity of the proceedings "themselves, *e.g.*, an alleged ir- "regularity in empannelling the "jury, or in discharging a jury, "or a defect appearing upon the "face of the indictment. The "result is, that the remedy by "writ of error is confined to a very "small number of cases of rare "occurrence."

(*i*) As to the recognizance required in error, see Dugdale *v.* The Queen, 1 Dearsley's C. C. R. 254.

(*k*) As to the construction of this statute, see per Lord Campbell, in the case of Holloway *v.* The Queen, 17 Q. B. 327.

[that the party shall be in the same plight as if he had appeared upon the *capias*; and if it be before plea pleaded, he shall be put to plead to the indictment: if after conviction, he shall receive the sentence of the law; for all the other proceedings, except only the process of outlawry for his nonappearance, remain good and effectual as before (*l*). But when judgment pronounced upon the *conviction* of the person indicted is falsified or reversed, all former proceedings against him are absolutely set aside, and the party stands as if he had never been at all accused. But he still remains liable to another prosecution for the same offence; for the first being erroneous, he never was in jeopardy thereby.]

(*l*) As to outlawry in criminal proceedings, see the Report of the Criminal Code Bill Commission, p. 36.

CHAPTER XXI.

OF REPRIEVE AND PARDON.

I. [A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution of a criminal is suspended (*a*).

This may be, in the first place, *ex mandato regis*, that is, the mere pleasure of the Crown, expressed to the court by which execution is to be awarded (*b*).

Again, there may be a reprieve *ex arbitrio judicis;* either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious or the indictment is insufficient, or sometimes if any favourable circumstances appear in the criminal's character, —in order to give room to apply to the Crown for either an absolute or conditional pardon (*c*).

Reprieves may also be *ex necessitate legis;* as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment; yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis;*

(*a*) Vide sup. p. 340. It should be observed, in reference to such portions of this and the following chapter as are substantially taken from Blackstone, that he is speaking chiefly of a judgment *of death*, —in his time, by reason of the severity of the law as it then existed, of far more frequent occurrence than at the present day. (Vide sup. p. 20 *in notis.*)

(*b*) 1 Hale, P. C. 368; 2 Hale, P. C. 412; Hawk. P. C. b. 2, c. 51, s. 8.

(*c*) See 2 Hale, P. C. 412.

[and therefore no part of the bloody proceedings, in the reign of queen Mary, hath been more justly detested than the cruelty that was exercised in the island of Guernsey, of burning a woman big with child; and when, through the violence of the flames, the infant sprang forth at the stake, and was preserved by the by-standers, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic (*d*). A barbarity which they never learned from the laws of *antient* Rome; which direct, with the same humanity as our own, "*quod prægnantis mulieris damnatæ pœna differatur, quoad pariat*" (*e*): which doctrine has also prevailed in England, as early as the first memorials of our law will reach (*f*). In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact (*g*); and if they bring in their verdict *quick with child*, (for, barely *with child*, unless it be alive in the womb, is not sufficient,) execution shall be stayed generally till the next session; and so from session to session, till either she is delivered or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a further respite for that cause (*h*). For she may now be executed before the child is quick in the womb: and shall not, by her own incontinence, evade the sentence of justice.

Another cause of regular reprieve is, if the offender become *non compos*, between the judgment and the award

(*d*) Fox, Acts and Mon.

(*e*) Ff. 48, 19, 3.

(*f*) Flet. l. 1, c. 38.

(*g*) This practice was followed in the year 1879, in a case of murder, in which, after sentence pronounced, an allegation of pregnancy was made by the prisoner. The jury of women then empannelled, from among those in court, were assisted in their inquiry by a surgeon; and the fact of pregnancy being found by them not to exist, the execution took place in due course.

(*h*) 1 Hale, P. C. 369.

[of execution (*i*); for by the common law, on which, as formerly shown, some new provisions have now been engrafted by the legislature, though a man be sane when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution; if after such order, it shall not be carried out: for "*furiosus solo furore punitur;*" and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings (*k*). It is, therefore, the rule to demand of the prisoner, after he has been found guilty, what he hath to allege, why execution should not be awarded against him; and if he then appears to be insane, the judge in his discretion may and ought to reprieve him.]

II. If neither pregnancy, insanity, non-identity, nor other special reason—which collateral question if raised by way of plea in bar of execution should, as the general rule, be determined forthwith by a jury for that purpose then empannelled (*l*), and of which no peremptory challenges are allowed the prisoner (*m*)—will avail to stay the execution consequent on the judgment, the last and surest resort is an Act of grace, or else the sovereign's most gracious *pardon;* the granting of which is the most amiable prerogative of the Crown. [Law, says an able writer, cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the sovereign in his coronation oath; and it is that act of his government which is the most personal, and most entirely his own (*n*). The king himself condemns no man; that rugged

(*i*) 1 Hale, P. C. 370.

(*k*) Vide sup. p. 25.

(*l*) See R. *v.* Corbet, 1 Sid. 72; Fost. 42.

(*m*) See R. *v.* Okey, 1 Lev. 61; Fost. 42, 46; Staundf. P. C. 163; Co. Litt. 157; Hal. Sum. 259.

(*n*) Law of Forfeit. 99. In our own times, the exercise of this royal prerogative has in some measure devolved on the responsible advisers of the Crown; and in practice is a

[task he leaves to his courts of justice; the great operation of his sceptre is mercy. His power of pardoning was said, by our Saxon ancestors, to be derived *a lege suæ dignitatis* (*p*); and it is declared in parliament, by statute 27 Hen. VIII. c. 24, that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm (*q*).

It is indeed one of the great advantages of monarchy, in general, above any other form of government, that there is a magistrate who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons, (according to some theorists,) should be excluded in a perfect legislation, where punishments are mild but certain: for the clemency of the prince seems a tacit disapprobation of the laws (*r*). But the exclusion of pardons would, of necessity, introduce a very dangerous power in the judge or jury, namely, that of construing the criminal law by the spirit instead of the letter (*s*); or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender, though they alter not the essence of the crime, ought to make no distinction in the punishment. In democracies, however, this power of pardon can never subsist; for there, nothing higher is acknowledged than the magistrate who administers the laws; and it would be impolitic for the power of judging and of pardoning, to centre in one and the same person. This, as the president Montesquieu

branch of the office of the secretary of state for the home department, on whose recommendation her Majesty usually acts in particular cases brought before her.

(*p*) Wilk. Leg. Ang.-Sax. LL. Edw. Conf. c. 18.

(*q*) It is laid down that this power belongs only to a king *de facto*, and not to a king *de jure* during the time of usurpation. (Bro. Abr. t. Charter de Pardon, 22.)

(*r*) Beccar. c. 20.

(*s*) Ib. c. 4.

[observes, would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell whether a prisoner were discharged by his innocence, or obtained a pardon through favour (*t*). But in monarchies, the sovereign acts in a superior sphere; and though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him, therefore, the people look up as the fountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear him to his subjects; and contribute more than anything to root in their hearts that filial affection and personal loyalty, which are the sure establishment of a prince.

Under this head of pardons we may, in the first place, observe that the sovereign may pardon all offences merely against the Crown or the public, excepting—1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm, was by the Habeas Corpus Act, 31 Car. II. c. 2, made a *præmunire*, unpardonable even by the king. Nor—2. Can the king pardon, where private justice is principally concerned in the prosecution of offenders; "*non potest rex gratiam facere cum injuriâ et damno aliorum*" (*u*). For example, he cannot pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it: though afterwards he may remit the fine: and this, because though the prosecution is vested in the king to avoid multiplicity of suits, yet during its continuance, this offence savours more of the nature of a *private* injury to each individual in the

(*t*) Sp. L. b. 6, c. 5. (*u*) 3 Inst. 236.

[neighbourhood, than of a *public* wrong (*x*).] It may be remarked, however, that by 22 Vict. c. 32, her Majesty is now expressly enabled to remit, wholly or in part, any sum of money which under any Act may be imposed upon a convicted offender, although such money may be wholly or in part payable to some party other than the Crown; and, if such offender has been imprisoned in default of payment, may nevertheless extend to him the royal mercy (*y*).

[There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments, viz. that the king's pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the second, the Earl of Danby was impeached by the house of commons of high treason and other misdemeanors, and pleaded the king's pardon in bar of the same, the commons alleged, "that there was no precedent that ever any "pardon was granted to any person impeached by the "commons of high treason, or other high crimes, *depend-*"*ing the impeachment*" (*z*); and thereupon resolved, "that "the pardon so pleaded was illegal and void, and ought "not to be allowed *in bar* of the impeachment of the "commons of England" (*a*); for which resolution they assigned this reason to the house of lords; "that the set-"ting up a pardon to be a *bar* of an impeachment, defeats "the whole use and effect of impeachments; for should "this point be admitted or stand doubted, it would totally "discourage the exhibiting any for the future, whereby "the chief institution for the preservation of the govern-

(*x*) Hawk. P. C. b. 2, c. 37, s. 33.

(*y*) See also 24 & 25 Vict. c. 96, s. 109, c. 97, s. 67, as to the remission of penalties imposed on a *summary conviction*, for offences made so punishable under those Acts. And see, also, 38 & 39 Vict. c. 80, in reference to penalties and forfeitures incurred under the 21 Geo. 3, c. 49, by profaning "the Lord's day called Sunday."

(*z*) Com. Journ. 28 April, 1679.

(*a*) Ib. 5 May, 1679.

[" ment would be destroyed" (*b*). And soon after the Revolution, the commons renewed the same claim, and voted " that a pardon is not pleadable in bar of an impeach- " ment" (*c*): and at length it was enacted by the Act of Settlement, 12 & 13 Will. III. c. 2, " that no pardon " under the Great Seal of England shall be pleadable to " an impeachment by the commons in parliament" (*d*). But after the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged; for after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the Crown, and at length received the benefit of the king's most gracious pardon (*e*).]

(*b*) Com. Journ. 26 May, 1679.

(*c*) Ib. 6 June, 1689.

(*d*) See Hallam's Const. Hist. vol. 2, p. 411, 7th ed. The effect of this enactment, was discussed in The Queen *v.* Boyes, 1 B. & Smith, p. 311.

(*e*) The following remarkable record, in which it is both acknowledged by the commons and asserted by the sovereign,—proves that the king's prerogative to pardon delinquents convicted in impeachments is as antient as the constitution itself.

"*Item prie la commune a nostre dit seigneur le roi, que nul pardon soit grante a nully persone, petit ne grande, q'ont este de son counseil et serementez, et sont empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tenemenz, biens, ou chateux, lesqueux sont ou serront trovez en aucun defaut encontre leur ligeance, et la tenure de leur dit serement; mais q'ils ne serront jammes conseillers ne officers du roi, mais en tout oustez de la courte le roi et de conseil as touz jours. Et sur ceo soit en present parlement fait estatut s'il plest au roi, et de touz autres en temps a venir en cas semblables, pur profit du roi et de roialme.*

"*Responsio: Le roi ent fra sa volente, come mieltz lui semblera.*" —Rot. Parl. 50 Edw. 3, n. 188.

After the lords have delivered their sentence of guilty, the commons have the power of pardoning the impeached convict, by refusing to demand judgment against him; for no judgment can be pronounced by the lords till it is demanded by the commons. Lord Macclesfield was found guilty without a dissenting voice in the house of Lords; but when the question was afterwards proposed in the house of commons, *that this house will demand judgment of the lords against Thomas earl of Macclesfield*, it occasioned a warm debate, but (the previous question being first moved) it was carried in the affirmative by a majority of 136 voices against 65. (Comm.

As to the manner of pardoning. 1. First, it must be by warrant either under the great seal, or the sign-manual (*f*). A warrant, indeed, under the sign-manual only was at one time held not competent to confer a complete irrevocable pardon (*g*). But now by 7 & 8 Geo. IV. c. 28, s. 13, where the Crown shall be pleased to extend the royal mercy to any offender convicted of any capital or other felony, and by warrant under the royal sign-manual, (countersigned by a principal secretary of state,) shall grant to him either a free or a conditional pardon; the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of his pardon under the great seal as to the felony for which such pardon shall be granted,—subject, however, to a proviso, that such discharge or performance shall have no effect to prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction, for any felony committed after the granting of any such pardon. There may also be a constructive pardon without warrant, by the mere endurance of the appropriate punishment. For, by 9 Geo. IV. c. 32, s. 3,—reciting that it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged,—it is enacted, that where any offender shall be convicted of any felony not punishable with death, and shall endure the punishment

Journ. 27 May, 1725; 6 H. St. Tr. 762.) It may be noticed that in the impeachment of Warren Hastings it was decided, after much serious and learned investigation and discussion, by a very great majority in each house of parliament, that an impeachment was not abated by a dissolution of the parliament; though almost all the legal characters of each house voted in the minorities. (4 Bl. Com. p. 400, note by Mr. Christian).

(*f*) A form of pardon under the Great Seal in a modern case—the offence pardoned being bribery at a parliamentary election—will be found in the case of The Queen *v.* Boyes, 1 B. & Smith, p. 311.

(*g*) Blackstone (ubi sup.) cites 5 St. Tr. 166, 173.

to which he hath been adjudged for the same, the punishment so endured shall have the like effects and consequences as a pardon under the Great Seal, as to the felony whereof the offender was so convicted (*h*);—subject, however, to a proviso, that it shall not prevent or mitigate any punishment to which he might otherwise be lawfully sentenced, on a subsequent conviction for any other felony. 2. [Next, it is a general rule, that whenever it may reasonably be presumed the king is deceived, the pardon is void (*i*). Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon will vitiate the whole; for the king was misinformed (*k*). 3. General words have also a very imperfect effect in pardons. A pardon of "all felonies," will not pardon one in respect of which a conviction has been already had, (for it is presumed the king knew not of those proceedings); but such conviction must be particularly mentioned (*l*). 4. It was also enacted by statute 13 Rich. II. st. 2, c. 1, that no pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and that, in a case of murder, it shall be expressed whether it was committed by lying in wait, assault, or malice prepense. Upon which Sir Edward Coke observes, that it was not the intention of the parliament, that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations (*m*). Yet pardons for such murders have been frequently granted since that period, and even under

(*h*) See Leyman *v.* Latimer, Law Rep., 3 Ex. D. 15, 352.

(*i*) Hawk. P. C. b. 2, c. 37, s. 8.

(*k*) 3 Inst. 238; Hawk. P. C. b. 2, c. 37, s. 46.

(*l*) Hawk. ubi sup. s. 8. See also s. 9, where he says that general pardons are commonly made by Act of Parliament, and have been rarely granted by the Crown.

(*m*) 3 Inst. 236.

[the general description of a felonious killing; there being always inserted therein, until the time of the Revolution, a *non obstante* of the statute of king Richard (*o*). But it being declared by the Bill of Rights, 1 W. & M. sess. 2, c. 2, that no dispensation by *non obstante* of any statute shall be thenceforth allowed, such general description would now seem to be insufficient (*p*). Under these and a few other restrictions, it is a general rule, that a pardon shall be taken most beneficially *for* the subject and most strongly *against* the king (*q*).]

A pardon may also be *conditional;* that is, the sovereign may extend his mercy upon what terms he pleases, and may annex to his bounty a condition, on the performance whereof the validity of the pardon will depend (*r*). And the prerogative is so exerted, in the pardon of one who has been convicted and sentenced to death,—a usual condition in such cases being, the endurance of imprisonment or penal servitude, in the discretion of the crown (*s*).

We have next to notice that an Act of grace (or pardon by Act of Parliament) is more beneficial than a pardon by

(*o*) Hawk. P. C. b. 2, c. 37, s. 17. It was once made a question whether murder can be the subject of a pardon under any form of words; and to this point the statutes 6 Edw. 1, st. 1, c. 9; 2 Edw. 3, c. 2, and 14 Edw. 3, st. 1, c. 15, have been cited. But it is now settled that the pardon of murder is as much within the prerogative of the Crown, as the pardon of any other offence. (R. *v.* Parsons, 1 Show. 283; 2 Salk. 499; 4 Mod. 61; 3 Inst. 236; Hawk. P. C. b. 2, c. 37, s. 14.)

(*p*) Hawk. P. C. b. 2, c. 37, s. 17.

(*q*) 4 Rep. 49 b.

(*r*) Hawk. P. C. b. 2, c. 37, s. 45.

(*s*) By 5 Geo. 4, c. 84, it was enacted, that whenever the Crown shall be pleased to extend mercy to an offender convicted of a capital crime on condition of his transportation beyond the seas, such offender shall be allowed the benefit of a conditional pardon, and an order shall be made by the court for his immediate transportation. And by 20 & 21 Vict. c. 3, whenever mercy shall be so extended on condition of his being kept in *penal servitude*, such extension of mercy shall have the same effect, as formerly in the case of the condition being transportation beyond seas. See also 6 & 7 Vict. c. 7, and 16 & 17 Vict. c. 99.

the king's charter; [for if it be a public Act a man is not bound to plead it, but the court must *ex officio* take notice of it (*u*); neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon (*x*). The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading not guilty, he has waived the benefit of such pardon (*y*). But if a man avails himself thereof, as soon as by course of law he may, a pardon may (as explained in a former place) either be pleaded upon arraignment, or in arrest of judgment, or in bar of execution (*z*). Antiently, by stat. 10 Edw. III. st. 1, c. 2, no pardon of felony could be allowed unless the party found sureties for his good behaviour, before the sheriff and coroners of the county (*a*). But that statute was repealed by the statute 5 & 6 W. & M. c. 13; which, instead thereof, gave the judges of the court a discretionary power to bind the criminal, pleading such pardon, to his good behaviour, with two sureties, for any term not exceeding seven years.

Lastly, the *effect* of such pardon by the king is to make the offender a new man: to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him new credit and capacity (*b*).] And it seems to be settled that a pardon of treason or felony will enable a man to have an action for slander against any one who shall thenceforth call him either traitor or felon (*c*): and, also, that, on accepting a pardon from the Crown,

(*u*) Fost. 43. See 13 & 14 Vict. c. 21, s. 7.
(*x*) Hawk. P. C. b. 2, c. 37, s. 59.
(*y*) Ib. s. 67.
(*z*) Vide sup. pp. 402, 442.
(*a*) R. *v.* Parsons, 1 Show. 283.
(*b*) Hawk. P. C. b. 2, c. 37, s. 48.
(*c*) Hawk. P. C. b. 2, c. 37, s. 48. See, also, Leyman *v.* Latimer, Law Rep., 3 Ex. D. pp. 15, 352, in which case it was held that the same effect follows the endurance of the punishment awarded.

the offender cannot refuse to give evidence respecting the offence pardoned, on the ground of possible danger to himself therefrom if he should be afterwards impeached for the same offence by the House of Commons—unless, indeed, there should be in fact some reasonable ground for his apprehension that such a proceeding is impending (*d*).

(*d*) See The Queen *v.* Boyes, 1 B. & Smith, 34.

CHAPTER XXII.

OF EXECUTION.

THERE now remains nothing to speak of but *execution*—the completion of human punishment. And the execution of a sentence of death (*a*) is to be carried out by the sheriff or his deputy (*b*): [whose warrant for so doing was antiently by precept under the hand and seal of the judge, as in the court of the lord high steward, upon the execution of a peer (*c*): though, in the court of the peers in parliament, it is by writ from the king. Afterwards it was established, that in case of life, the judge may command execution to be done without any writ (*d*). And now the usage is, for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff as his warrant or authority; and, if the sheriff receive afterwards no special order to the contrary, he executes the judgment of the law accordingly (*e*)].

(*a*) Vide sup. pp. 340 and 467, n. (*a*).

(*b*) Although prisoners in general are now removed from the custody of the sheriff, by the effect of 28 & 29 Vict. c. 126, and 40 & 41 Vict. c. 21 (vide sup. vol. III. pp. 123, 124), yet it is provided that nothing therein contained, shall affect his jurisdiction or responsibility, in respect of persons under *sentence of death* and confined in any prison within his jurisdiction; or his jurisdiction or control over the prison where such prisoners are confined, and the officers thereof,—so far as may be necessary for the purpose of carrying into effect such sentence, or for any purpose relating thereto.

(*c*) 2 Hale, P. C. 409.

(*d*) Finch, L. 478.

(*e*) See R. *v.* Bethel, 5 Mod. 22; Christian's Blackstone, vol. iv. p. 404, *in notis*, where it is said that, "at the end of the assizes the "clerk of the assize makes out "in writing four lists of all the

The sheriff, upon receipt of his warrant from the judge of the assize, is to do execution within a convenient time; which is left at large (*f*). But if the prisoner be tried at the bar of the Queen's Bench division of the High Court of Justice, or be brought there by *habeas corpus*, a rule is made for the execution; either specifying the time or leaving it to the discretion of the sheriff (*g*). [And though there is no general rule as to the time of execution after judgment, it has been well observed, that it is of great importance that the punishment should follow the crime as early as possible; and that the prospect of gratification or advantage which tempts a man to commit the crime, should instantly awake the attendant idea of punishment (*h*).

" prisoners, with separate columns, " containing their crimes, verdicts " and sentences, leaving a blank " column, which the judge fills up " opposite the names of the capi- " tal convicts by writing *to be re-* " *prieved, respited, transported*, &c. " These four calendars, being first " carefully compared together by " the judge and the clerk of assize, " are signed by them, and one is " given to the sheriff, one to the " gaoler, and the judge and the " clerk of assize each keep another. " If the sheriff receives afterwards " no special order from the judge, " he executes the judgment of the " law in the usual manner, agree- " ably to the directions of his " calendar. In every county this " important subject is settled with " great deliberation by the judge " and the clerk of assize before the " judge leaves the assize town: " but probably in different coun- " ties with some slight variations."

(*f*) The *time* of the execution is by law no part of the judgment (see 4 Bl. Com. 404, where this is said to have been held by the twelve judges, Mich. 10 Geo. 3). As to the *place* of execution it is now, in all executions for *murder*, required by the 31 & 32 Vict. c. 24, to be within the walls of the prison in which he shall be confined at the time of execution (vide sup. p. 75).

(*g*) St. Trials, vi. 332; Fost. 43. See Atkinson *v.* Reg. (in error), 3 Bro. P. C. 517; Mansell *v.* The Queen, 8 Ell. & Bl. p. 84.

It may be remarked that in London the course as to execution on convicts formerly was, that the recorder reported to the king, in person, their several cases; and, if he received the royal pleasure that the law must take its course, issued his warrant to the sheriffs, directing them to do execution at a specified time and place (4 Bl. Com. 404). But now by 7 Will. 4 & 1 Vict. c. 77, the practice of the Central Criminal Court, as to the award of execution in capital cases, is assimilated to that of other criminal courts.

(*h*) Beccar. c. 19.

[The sheriff cannot alter the manner of the execution, by substituting one death for another, without being guilty of felony himself, as has been formerly said (*i*). It was held also by Sir Edward Coke (*j*) and Sir Matthew Hale (*k*), that even the king could not change the punishment of the law, by altering hanging or burning into beheading; though, when beheading was part of the sentence, the king might remit the rest. And, notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains, that "*judicandum est legibus, non exemplis.*" But others have thought that this prerogative, being founded in mercy, and immemorially exercised by the Crown, was part of the common law (*l*). It is observable, that when Lord Stafford was executed for the popish plot in the reign of King Charles the second, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords for a command or order from their lordships how the said judgment should be executed; for, he being prosecuted by impeachment, they entertained a notion, (which is said to have been countenanced by Lord Russell,) that the king could not pardon any part of the sentence (*m*). The lords however resolved, that the scruples of the sheriffs were unnecessary, and declared that the king's writ ought to be obeyed (*n*). Disappointed of raising a flame in that assembly, they immediately signified to the house of commons, by one of the members, that they were not satisfied as to the power of the said writ (*o*). That house took two days to consider of it; and then sullenly resolved, that the house was *content* that the sheriff do execute Lord Stafford by severing his head from his body (*p*). It is further related, that when afterwards the

(*i*) Vide sup. p. 48.
(*j*) 3 Inst. 52.
(*k*) 2 Hale, P. C. 412.
(*l*) Fost. 270; F. N. B. 144, h; 19 Rym. Fœd. 284.
(*m*) 2 Hume, 328.
(*n*) Lords' Journ. 21 Dec. 1680.
(*o*) Com. Journ. 21 Dec. 1680.
(*p*) Ib. 23 Dec. 1680.

[same Lord Russell was condemned for high treason upon indictment, the king, while he remitted the ignominious part of the sentence, observed, "that his lordship would "now find he was possessed of that prerogative which, in "the case of Lord Stafford, he had denied him" (*q*). One can hardly determine (at this distance from those turbulent times) which most to disapprove of; the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

To conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again (*r*). For the former hanging was no execution of the sentence; and if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force, such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his fleeing to sanctuary was held an escape in the officer (*s*).]

And having thus spoken of execution, the *last* stage of criminal proceedings; which terminates our inquiry into the law of crimes, the subject of the sixth Book,—we have also reached the end, properly speaking, of these Commentaries: yet it may be useful to endeavour to recall to the memory of the student some principal outlines of the legal constitution of this country, by a short historical review of the most considerable revolutions that have happened in the laws of England from the earliest to the present times: and this task shall be now attempted by way of conclusion.

(*q*) 2 Hume, 360.

(*r*) 2 Hale, P. C. 412; Hawk. P. C. b. 2, c. 51, s. 7.

(*s*) Fitzh. Abr. tit. "Corone," 335; Finch, L. 467. As to an escape, vide sup. p. 264.

CONCLUSION.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENT, OF THE LAWS OF ENGLAND.

[BEFORE we enter on our present subject, in which it is proposed by way of supplement to the whole work, to attempt an historical review of the most remarkable changes and alterations that have happened in the laws of England,—it must be observed, that the rise and progress of many principal points and doctrines have been already pointed out in the course of these Commentaries, under their respective divisions; these having, therefore, been particularly discussed already, it cannot be expected that they should be re-examined with any degree of minuteness, which would be a most tedious undertaking. What, therefore, is at present proposed, is only to mark out some outlines of our English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

The several periods under which we shall consider the state of our legal policy, are the following: 1. From the earliest times to the Norman Conquest: 2. From the Norman Conquest to the reign of king Edward the first: 3. From thence to the reformation: 4. From the reformation to the restoration of king Charles the second: 5. From thence to the revolution in 1686:] 6. From the era last mentioned to the present time.

1. [And, first, with regard to the antient Britons, the *aborigines* of our island, we have so little handed down

[to us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. However, from Cæsar's account of the tenets and discipline of the antient Druids in Gaul, in whom centred all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesea,) to be instructed,—we may collect a few points, which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly the very notion itself of an oral unwritten law, delivered down from age to age by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters: since it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavelkind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry the eighth, is undoubtedly of British original. So likewise is the antient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume, namely, that of burning a woman guilty of the crime of petty treason by killing her husband (*a*).

The great variety of nations, that successively broke in upon and destroyed both the British inhabitants and constitution,—the Romans, the Picts, and, after them, the various clans of Saxons and Danes,—must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom, as they were very soon incorporated and blended together; and therefore we may

(*a*) Vide sup. p. 77.

[suppose, mutually communicated to each other their respective usages, in regard to the rights of property and the punishment of crimes (*b*). So that it is morally impossible to trace out with any degree of accuracy, *when* the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles (*c*). We can seldom pronounce, that *this* custom was derived from the Britons; *that* was left behind by the Romans: *this* was a necessary precaution against the Picts; *that* was introduced by the Saxons; discontinued by the Danes, but afterwards restored by the Normans.

Wherever this can be done, it is a matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice (*d*); so, that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and its government: which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of its laws; unless we had as authentic monuments thereof, as the Jews had by the hand of Moses (*e*). Thirdly, this uncertainty of the true origin of particular customs must also in part have arisen from the means whereby

(*b*) Hale, Hist. C. L. 62.

(*c*) "It is an impossible piece of "chemistry," says Hale, "to re-"duce every *caput legis* to its true "original, &c."—Hale, ubi sup. 64.

(*d*) Hale, ubi sup. 57.

(*e*) Hale, ubi sup. 59.

[Christianity was propagated among our Saxon ancestors in this island—by learned foreigners brought over from Rome and other countries, who undoubtedly carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause, that we find not only some rules of the Mosaical, but also of the imperial and pontifical laws, blended and adopted into our own system.

A further reason may also be given for the great variety, and of course the uncertain original, of our antient established customs; even after the Saxon government was firmly established in this island: viz. the subdivision of the kingdom into many independent kingdoms, peopled and governed by different clans and colonies (*f*). This must necessarily create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally sprung from the same mother-country, the great northern hive; which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments: and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen where so many unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

(*f*) It has been supposed from the above passage, by Mr. Freeman (see Growth of the English Constitution, &c., note, 31), that Blackstone was ignorant of the *progressive* way in which England became reduced under the dominion of the several Teutonic tribes by whom it was invaded. There is, however, no reason to believe that his views on this subject were otherwise than correct.

[When therefore the West Saxons had swallowed up all the rest, and King Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him, we are told, to undertake a most great and necessary work, which he is said to have executed in as masterly a manner; no less than to new model the constitution; to rebuild it on a plan that should endure for ages, and out of its old discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform and well-connected whole. This he effected by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours; for to him we owe that masterpiece of judicial policy, the subdivision of England into tithings and hundreds, if not into counties, all under the influence and administration of one supreme magistrate, the king: in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating ducts and chattels; which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected, it is said, the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his dom-boc, or *liber judicialis*. This he compiled for the use of the court-baron, the hundred court, the sheriff's county court, the court-leet, and the sheriff's tourn: tribunals which he established for the trial of all causes civil and criminal, in the very districts wherein the complaint arose: all of them subject however to be inspected, controlled and kept within the bounds of the universal or common law by the king's own courts, which were then itinerant, being kept in the king's palace and removing with his household in those royal progresses, which he

[continually made from one end of the kingdom to the other (*g*).

The Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric, but a plan so excellently concerted could never be long thrown aside. So that upon the expulsion of these intruders, the English returned to their antient law, retaining however some few of the customs of their late visitants, which went under the name of *Dane Lage*, as the code compiled by Alfred was called the *West-Saxon Lage;* and the local constitutions of the antient kingdom of Mercia, which obtained in the counties nearest to Wales and probably abounded with many British customs, were called the *Mercen Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm: the provincial policy of counties and their subdivisions having never been altered or discontinued through all the shocks and mutations of government, from the time of its first institution: though the laws and customs therein used have, as we shall see, often suffered considerable changes.

For King Edgar, (who besides his military merit as founder of the English navy, was also a most excellent civil governor,) observing the ill effects of three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and begun what his grandson King Edward the Confessor afterward completed: viz. one uniform digest or body of laws to be observed throughout the whole kingdom, being probably no more than a revival of King Alfred's code, with some improvements suggested by necessity and experience; particularly the incorporating some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon Lage*, which was still the ground-

(*g*) As to the claim of Alfred to the institutions mentioned in the text, see Turner's Hist. of the Anglo-Saxons, vol. ii. p. 149, 6th ed.; Hallam's Middle Ages, vol. ii. pp. 390, 402, 7th ed.

[work of the whole. And this appears to be the best supported and most plausible conjecture, (for certainty is not to be expected,) of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of the common law, as extending its authority universally over all the realm, and which is doubtless of Saxon parentage.

Among the most remarkable of the Saxon laws we may reckon. 1. The constitution of parliament, or rather general assemblies of the principal and wisest men in the nation; the *wittenagemote* or *commune consilium* of the antient Germans, which was not yet reduced to the forms and distinctions of our modern parliament, without whose concurrence, however, no new law could be made or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates,—their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their portreeves (since changed into mayors and bailiffs), and even their tithingmen and borsholders at the leet,—continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued; only that perhaps, in case of minority, the next of kin of full age would ascend the throne as king, and not as protector; though after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence, even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage: to which, in subsequent times, the benefit of clergy in some measure succeeded. 5. The prevalence of certain customs—as heriots and military services in proportion to every man's

[land, which much resembled the feudal constitution, but yet were exempt from all its rigorous hardships; and which may be well enough accounted for by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feudal law, before it got into the hands of the Norman jurists; who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty. 6. The liability of their estates to forfeiture for treason, while the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture: a custom which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest; though really inconvenient, and more especially destructive to antient families, which are in monarchies necessary to be supported, in order to form and keep up a nobility, or intermediate state between the prince and the common people. 8. The courts of justice—consisting principally of the sheriff's county court, and in cases of weight or nicety the king's court held before himself in person, at the time of his parliaments; which were usually holden in different places, according as he kept the three great festivals of Christmas, Easter, and Whitsuntide. An institution which was adopted by King Alonso the seventh, of Castile, about a century after the Conquest, who, at the same three great feasts, was wont to assemble his nobility and prelates in his court; who there heard aud decided all controversies, and then, having received his instructions, departed home (*h*). In these antient courts the ecclesiastical and civil jurisdiction were blended together, the bishop and the sheriff originally sitting together, and the decisions and proceedings therein were simple and unembarrassed; an advantage which will always attend

(*h*) Mod. Un. Hist. xx. 114.

[the infancy of any laws, but wears off as they gradually advance to antiquity. 9. The modes of trial—which, among a people who had a very strong tincture of superstition, were permitted to be by *ordeal*, by the *corsned*, or morsel of execration, or by *wager of law* with compurgators. And to these may be added the occasional resort to modes of determining controversies, resembling, in some respects, the celebrated institution now known to us under the name of trial by jury (*i*). Thus stood the general frame of our policy at the time of the Norman invasion, when the second period of our legal history commences.

II. This remarkable event wrought as great an alteration in our laws, as it did in our antient line of kings; and though the alteration of the former was effected rather by the consent of the people, than by any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. Among the first of these alterations, we may reckon the separation of the ecclesiastical courts from the civil: effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people, and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests; and this was the more easily effected, because the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

(*i*) See Turner's Hist. Ang.-Sax. vol. iii. p. 223, 6th edit.; Hallam's Mid. Ag. vol. ii. p. 396, 7th ed.

[2. Another violent alteration of the English constitution consisted in the depopulation of whole counties for the purposes of the king's royal diversion, and subjecting both them, and all the antient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. And though these laws were mitigated in the time of Henry the third and in succeeding reigns,—yet, from this root afterwards sprung a bastard slip, known by the name of the game laws,] by which none were permitted, in general, to take or sell game, even on his own estate, unless qualified by the ownership of land to the yearly value of at least 100*l.*; an arbitrary restraint under which the subjects of this realm ccntinued to labour, until its tardy abolition in the reign of William the fourth.

3. [A third alteration in the English laws was by narrowing the remedial influence of the sheriff's county court, the great seat of Saxon justice, and extending the *original* jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with all its multifarious authority, was erected, and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the Crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy; and the consequence naturally was, that all proceedings in the king's court were ordained to be carried on in the Norman instead of the English language: a provision necessary, indeed, because none of his Norman justiciars understood English: but as evident a badge of slavery as ever was imposed upon a conquered people. This lasted till King Edward the third obtained a double victory, over the armies of France in their own country, and the language in our courts here at home: but there was one mischief too deeply rooted thereby, and which this caution

[of King Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the sheriff's county court, the chicanes and subtleties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed that age, and those immediately succeeding it, were the era of refinement and subtlety. There is an active principle in the human soul, that will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those who had leisure to cultivate its progress were such only as were cloistered in monasteries, the rest being all soldiers or peasants; and unfortunately, the first rudiments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the East by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rising state, were those of the noblest kind,—the establishment of religion, and the regulations of civil policy,—yet, having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtleties, with a skill most amazingly artificial; but which serves no other purpose than to show the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy, especially when blended with the new refinements engrafted upon feudal property; which refinements were from time to time gradually intro-

[duced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely but more intelligible maxims of distributive justice among the Saxons. And, to say the truth, these scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal policy, that they cannot now be taken out without a manifest injury to the substance, unless the greatest care be used in the operation. Statute after statute has in later times been made to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour; and the endeavour has greatly succeeded; but still the scars are deep and visible; and the liberality of our modern courts of justice has been much called into action, in aid of the express enactments, in order to recover that equitable and substantial justice which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

4. A fourth innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations, but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century; and from them it passed to other nations, particularly the Franks and the Normans; which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. But the last and most important alteration, both in our civil and military policy, was the engrafting on all landed estates, a few only excepted, the fiction of feudal tenure, which drew after it a numerous and oppressive train of servile fruits and appendages: aids, reliefs, primer seisins, wardships, marriages, escheats and fines for alienation; the genuine consequences of the maxim then adopted,

[that all the lands in England were derived from and holden mediately or immediately of the Crown.

The nation at this period seems to have groaned under as absolute a slavery as was in the power of a warlike, an ambitious and a politic prince to create. The consciences of men were enslaved by sour ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived; who now imported from Rome for the first time the whole *farrago* of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws, too, as well as the prayers, were administered in an unknown tongue. The antient trial by jury gave way to the impious decision by battle. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy *curfew*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites, who by a gradual progression of slavery, were absolute vassals to the Crown, and as absolute tyrants to the commons. Unheard-of forfeitures, talliages, aids and fines were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight service, the king had always ready at his command an army of sixty thousand knights or *milites*: who were bound, upon pain of confiscation of their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade, or foreign merchandise, such as it then was, was carried on by the Jews and Lombards; and the very name of an

[English fleet, which king Edgar had rendered so formidable, became utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers or inferior tradesmen, who, from their insignificancy, happily retained, in their socage and burgage tenure, some points of their antient freedom. All the rest were villeins or bondmen.

From so complete and well-concerted a scheme of servility, it has been the work of generations for our ancestors to redeem themselves and their posterity into that state of liberty which we now enjoy: which, therefore, is not to be looked upon as consisting of mere encroachments on the Crown, and infringments on the prerogative, as some slavish and narrow-minded writers have endeavoured to maintain: but as, in general, a gradual restoration of that antient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that restoration has in a long series of years been step by step effected, we now proceed to inquire.

William Rufus proceeded on his father's plan; and in some points extended it, particularly with regard to the forest laws. But his brother and successor, Henry the first, found it expedient, when first he came to the crown, to ingratiate himself with the people, by restoring (as our monkish historians tell us) the laws of king Edward the Confessor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feudal tenures; but reserved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the *curfew* (*k*); for, though it is mentioned in our laws a full century afterwards (*l*),

(*k*) Spelm. Cod. LL. W. 1, 288, Hen. 1, 299.

(*l*) Stat. Civ. Lond. 13 Edw. 1.

[yet it is rather spoken of as a known *time* of night (so denominated from that abrogated usage) than as a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the Confessor, but with great additions and alterations of his own, and chiefly calculated for the regulation of the sheriff's county court. It contains some directions as to crimes and their punishments (that of theft being made capital in his reign), and a few things relating to estates, particularly as to the descent of lands; which being by the Saxon laws equally to all the sons,—by the feudal or Norman to the eldest only,—King Henry here moderated the difference; directing the eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots; reserving, however, the following ensigns of patronage,—*congé d'eslire*, custody of the temporalities when vacant, and homage upon their restitution. He, lastly, united again for a time the civil and ecclesiastical courts: which union was soon dissolved by his Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time: from whence we may easily perceive how far short this was, of a thorough restitution of King Edward's or the Saxon laws.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign, however, that we are to date the introduction of the Roman civil and canon laws into this realm; and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

By the time of King Henry the second, if not earlier,

[the Charter of Henry the first seems to have been forgotten; for we find the claim of marriage, ward, and relief then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived; being found more convenient for the public, than the parcelling of estates into a multitude of minute subdivisions. However, in this prince's reign, much was done to methodize the laws, and reduce them into a regular order, as appears from that excellent treatise of Glanvil: which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the first, it carries a manifest superiority (*m*). Throughout his reign, also, was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the first: when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the reign of Henry the second, now under consideration, there are four things which peculiarly merit the attention of a legal antiquary: 1. The constitution of the parliament at Clarendon, A.D. 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from their secular jurisdiction: though his further progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices of eyre, *in itinere;* the king having divided the kingdom into six circuits,—a division but little different from the present; and having commissioned these new created judges to administer justice and try writs of assize, in the several counties. These remedies are said to have been then first invented: before

(*m*) Hale, Hist. C. L. 138.

[which, all causes were usually terminated in the sheriff's county court, according to the Saxon custom; or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assize, or trial by special kind of jury, in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battle. 4. To this time must also be referred the introduction of escuage, or pecuniary commutation for personal military service; which in process of time was the parent of the antient subsidies granted to the Crown by parliament, and the land-tax of later times.

Richard the first, a brave and magnanimous prince, was a sportsman as well as a soldier; and therefore enforced the forest laws with some rigour, which occasioned many discontents among his people; though (according to Matthew Paris) he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron, which are still extant, and of high authority; for in his time we began again to discover that (as an island) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre; the king's thoughts being chiefly taken up by the knight errantry of a crusade against the Saracens in the holy land.

In King John's time, and that of his son, Henry the

[third, the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories; which, at last, had this effect, that, first, King John, and afterwards his son, consented to the two famous charters of English liberties, *Magna Charta* and *Charta de Foresta*. Of these the latter was well calculated to redress many grievances and encroachments of the Crown, in the exertion of forest laws; and the former confirmed many liberties of the Church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses or other process for debts or services due to the Crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the law relative to the forfeiture of lands for felony, and prohibited for the future the grants of exclusive fisheries, and the erection of new bridges, so as to oppress the neighbourhood. With respect to private rights, it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it regulated the law of dower; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern, it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice, besides prohibiting all denials or delays of it, it fixed the Court of Common Pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and, at the same time, brought the trial of issues home to the very doors of the

[freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits: it also corrected some abuses incident to the trials by wager of law and of battle; directing the regular awarding of inquests for life or member; prohibited the king's inferior ministers from holding pleas of the Crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the sheriff's county court, the sheriff's tourn, and the court leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the *great* charter,) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land (*n*).

However, by means of these struggles the pope, in the reign of King John, gained a still greater ascendant here than he ever had before enjoyed, which continued through the long reign of his son, Henry the third, in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may, by this time, perceive in Bracton's treatise, a still further improvement in the method and regularity of the common law, especially in the point of pleadings (*o*). Nor must it be forgotten, that the first traces which remain of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of King John,

(*n*) The following is the celebrated 29th chapter of *Magna Charta*, the foundation of the liberty of Englishmen: "*Nullus liber homo capiatur, vel imprisonetur, aut dissesiatur de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus aut differemus rectum vel justitiam.*"

(*o*) Hale, Hist. C. L. 156.

[though omitted in that of Henry the third; and that towards the end of the latter of these reigns we find the first record of any writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. The third period commences with the reign of Edward the first, who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to affirm, that more was done in the first thirteen years of his reign, to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together (*p*).

It would be endless to enumerate all the particulars of these regulations; but the principal may be reduced under the following general heads. 1. He established, confirmed and settled the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction; and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction,—those of the king's bench, common pleas, and exchequer,—so as they might not interfere with each other's proper business, to do which they were afterwards obliged to have recourse to fictions. 4. He settled the boundaries of the inferior courts, confining them to causes of no great amount, according to their primitive institution; though of considerably greater than, by the alteration of the value of money, they were afterwards permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages levied without consent of the national council. 6. He guarded the com-

(*p*) Hale, Hist. C. L. 158.

[mon justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities, and effect of fines levied in the Court of Common Pleas, though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom, few of which are more antient than the reign of his father, and those were by him collected. 9. He improved upon the laws of King Alfred, by that great and orderly method of watch and ward for preserving the public peace and preventing robberies established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution not only upon goods and chattels, but also upon lands, by writ of *elegit*; which was of signal benefit to a trading people; and, upon the same commercial ideas, he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade,—contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also closed the great gulf in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. 14. He established a new limitation of property by the creation of estates tail: concerning the good policy of which, however, in the strict shape at least that originally belonged to them, modern times have entertained a very different opinion. 15. He reduced all Wales to the subjection not only of the Crown, but, in great measure, of the laws of England—an improvement which was afterwards thoroughly completed; and he seems to have entertained a design of doing the like by Scotland,

[so as to have formed an entire and complete union of the island of Great Britain.

This catalogue might be continued much further: but, upon the whole, we may observe, that the very scheme and model of the administration of common justice between party and party was entirely settled by this king (*q*); and has continued nearly the same, in all succeeding ages, to this day; abating some few alterations, which the humour or necessity of subsequent times hath occasioned. The forms of writs, by which actions were commenced, were remodelled in his reign. The pleadings, consequent upon the writs, became then short, nervous, and perspicuous; not intricate, verbose and formal. The legal treatises, written in his time, as Britton, Fleta, Hengham and the rest, are, for the most part, law at this day; or at least *were* so, till the alteration of tenures took place (*r*). And, to conclude, it is from this period, from the exact observation of *Magna Charta*, rather than from its making or renewal in the days of his grandfather and father, that the liberty of Englishmen began again to rear its head, though the weight of the military tenures hung heavy upon it for many ages after.

A better proof cannot be given of the excellence of his constitution, than that from his time to that of Henry the eighth there happened very few, and those not very considerable, alterations in the legal *forms* of proceedings. As to matter of substance: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward the second and Edward the third; and justices of the peace were established instead of such conservators. In the reign also of Edward the third, the parliament is supposed most probably to have assumed its present form; by a separation of the Commons from the

(*q*) Hale, Hist. C. L. 162.

(*r*) As to these, see Hist. Eng. Law, by Reeves, vol. ii. p. 280, &c.

[Lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings, from French into Latin, another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging cloth-workers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general; for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law, to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *præmunire*, for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century; though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry the seventh, the civil wars and disputed titles to the crown gave no leisure for further juridical improvement: "*nam silent leges inter arma.*" And yet it is to these very disputes, that we owe the happy loss of all the dominions of the Crown on the continent of France; which turned the minds of our sub-

[sequent princes entirely to domestic concerns. Hence, likewise, sprang the method of barring entails by the fiction of *common recoveries*, invented originally by the clergy to evade the statutes of mortmain, but introduced under Edward the fourth, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of *uses*, another of the clerical inventions.

In the reign of King Henry the seventh, his ministers, not to say the king himself, were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign was, that of amassing treasure in the king's coffers, by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this, and this only, for their great and immediate object. To this end the Court of Star Chamber was new modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to alien. The benefit of clergy, which so often intervened to stop attainders and save the inheritance, was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry, his goods became the property of the Crown. In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what

[either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history, viz. the reformation of religion, under Henry the eighth, and his children; which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now for ever routed and destroyed, all his connexions with this island cut off, the Crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the king. And, had the spiritual courts been at this time reunited to the civil, we should have seen the old Saxon constitution, with regard to ecclesiastical polity, completely restored.

With regard also to our *civil* policy, the statute of wills and the statute of uses, both passed in the reign of this prince, made a great alteration as to property: the former by allowing the devise of real estates by will, which before was in general forbidden: the latter, by endeavouring to destroy the intricate nicety of *uses*, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense: which, however, arbitrarily exercised or productive of jealousies in its infancy, at length matured into a system of rational jurisprudence; the principles of which, however they might differ in forms, were now equally adopted by the courts of both law and equity. From the statute of uses, and another statute of the same antiquity, which protected estates for years from being destroyed by the reversioner, a remarkable alteration took place in the mode of conveyancing: the antient assurance by feoffment and livery upon the land being thenceforth very seldom practised, since the more easy and more private invention of transferring property by secret conveyances to uses,—and long

[terms of years being now continually created in mortgages and family settlements, which might be moulded to a thousand useful purposes by the ingenuity of an able artist.

The further attacks in this reign upon the immunity of estates tail, which reduced them to little more than the conditional fees at the common law before the passing of the statute *De donis;* the establishment of recognizances in the nature of a statute staple, for facilitating the raising of money upon landed security, and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate, trader; all these, were capital alterations of our legal policy, and highly convenient to that character (which the English began now to reassume) of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy; and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry the eighth a very distinguished era in the annals of juridical history.

It must be however remarked, that, particularly in his later years, the royal prerogative was strained to a very tyrannical and oppressive height; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and newfangled treasons, which were slightly touched upon in a former place. Happily for the nation this arbitrary reign was succeeded by the minority of an amiable prince, during the sunshine of which great part

[of these extravagant laws were repealed. And to do justice to the shorter reign of Queen Mary, many salutary and popular laws, in civil matters, were made under her administration, perhaps the better to reconcile the people to the bloody measures which she was induced to pursue for the re-establishment of religious slavery; the well-concerted schemes for effecting which were, through the providence of God, defeated by the seasonable accession of Queen Elizabeth.

The religious liberties of the nation being, by that happy event, established (it is to be trusted) on an eternal basis, though obliged in their infancy to be guided, against papists and other nonconformists, by laws of too sanguinary a nature; the forest laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the institutions of King Edward the first, without any material innovations; all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements;—except only in the continuation of the military tenures, and a few other points, which still armed the Crown with a very oppressive and dangerous prerogative. It is also to be remarked, that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the *restraining* statutes, to prevent the alienation of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of Queen Elizabeth, more humane and beneficial than even

[the feeding and clothing of millions; by affording such poor the means, with proper industry, to feed and to clothe themselves. And, the further any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

However, considering the reign of Queen Elizabeth in a great and political view, there is no reason to regret many subsequent alterations in the English constitution. For, though in general she was a wise and excellent princess, and loved her people: though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet the increase of the power of the Star Chamber, and the erection of the High Commission Court in matters ecclesiastical, were the work of her reign. She also kept her parliaments at a very awful distance: and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true, she very seldom exerted this prerogative, so as to oppress individuals; but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to show, that these were not golden days of genuine liberty as some have taught; for surely the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power, of the sovereign.

The great revolutions that had happened in manners and in property, had paved the way, by imperceptible yet sure degrees, for as great a revolution in government: yet, while that revolution was effecting, the Crown became more arbitrary than ever, by the progress of those very means which afterwards reduced its power.

It is obvious to every observer, that till the close of the

[Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth before the extension of trade was comparatively small; and the nature of their landed property was such as kept them in continual dependence upon their feudal lord, being usually some powerful baron, some opulent abbey, or sometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals, were little regarded or thought of; nay, even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler, which were afterwards applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments, of a Sidney, a Locke and a Milton. But when learning, by the invention of printing and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent discovery of the Indies: the minds of men, thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative (the nobility and clergy), were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury (which

[knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves), and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates and alienate their antient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty: and the commons were not yet sensible of the strength they had acquired, nor urged to examine its extent by new burthens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamed of opposing the prerogative, to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were, therefore, the times of the greatest despotism that have been known in this island since the death of William the Norman: the prerogative, as it then stood by common law, and much more when extended by Act of Parliament, being too large to be endured in a land of liberty.

Queen Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father King Henry the eighth. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the Queen of Scots, occasioned greater caution in her conduct. She, probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She there-

[fore drew a veil over the odious part of the prerogative; which was never wantonly thrown aside, but only to answer some important purpose: and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely for the space of half a century together, reign in the affections of the people.

On the accession of King James the first, no new degree of royal power was added to, or exercised by, him: but such a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported: and common reason assured them, that if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability, as well as inclination, to resist it; and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the mean time very little was done for the improvement of private justice except the abolition of sanctuaries, and the extension of the bankrupt laws,

[the limitation of suits and actions, and the regulating of informations upon penal statutes. For we cannot class the laws against witchcraft and conjuration, under the head of improvements; nor did the dispute between Lord Ellesmere and Sir Edward Coke, concerning the powers of the Court of Chancery, tend much to the advancement of justice.

Again, when Charles the first succeeded to the crown of his father, and attempted to revive some enormities which had been dormant in the reign of King James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that misguided prince's reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the Petition of Right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest laws, which the Crown most unseasonably revived. The legal jurisdiction of the Star Chamber and High Commission Courts was also extremely great; though their usurped authority was still greater. And, if we add to these, the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors, in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given; for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the Star Chamber and High Commission Courts, for ascertaining the extent of forests and forest laws, for renouncing ship-money and other exactions, and for giving up the

[prerogative of knighting the king's tenants *in capite* in consequence of their feudal tenures: though it must be acknowledged that these concessions were not made with so good a grace as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befall a prince. Though he formerly had strained his prerogative not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he now consented to reduce it to a lower ebb than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that his condescension was merely temporary. Flushed, therefore, with the success they had gained, fired with resentment for past oppressions, and dreading the consequences if the king should regain his power, the popular leaders, who in all ages have called themselves the *people*, began to grow insolent and ungovernable; their insolence soon rendered them desperate; and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the Church and monarchy, and proceeded, with deliberate solemnity, to the trial and murder of their sovereign.

We pass by the crude and abortive schemes for amending the laws, in the times of confusion which followed: the most promising and sensible whereof, such as the establishment of new trials, the abolition of feudal tenures, the Act of navigation, and some others, were adopted in the—

V. Fifth period, which is to be next mentioned, viz. after the restoration of King Charles the second. Immediately upon which, the principal remaining grievances, the doctrine and consequences of military tenures, was taken away and abolished, except in the instance of cor-

[ruption of inheritable blood, upon attainder of treason and felony. And though the monarch in whose person the royal government was restored, and with it our antient constitution, deserves no commendation from posterity, yet in his reign, wicked, sanguinary, and turbulent as it was, the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our Church and monarchy, but also the complete restitution of English liberty, for the first time since its total abolition at the Conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from incumbering the estates of the subject: but also an additional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the *Habeas Corpus* Act. These two statutes, with regard to our property and persons, form a second *Magna Charta*, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriances of the feudal system: but the statute of Charles the second extirpated all its slaveries,—except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts of justice, and under modern enactments seem to be approaching a final extinction. *Magna Charta* only, in general terms, declared, that no man shall be imprisoned contrary to law: the *Habeas Corpus* Act points him out effectual means, as well to release himself, (though committed even by the king in council,) as to punish all those who shall thus unconstitutionally misuse him.

To this may be added the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the abolition of the writ *de hæretico comburendo;* the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestates' estates; and that of amendments and *jeofails*, which cut off many of those

[superfluous niceties which so long had disgraced our courts; together with many wholesome Acts that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, "that the constitution of England "had arrived to its full vigour, and the true balance "between liberty and prerogative was happily established "by *law*, in the reign of Charles the second" (*r*).

It is by no means intended to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestable is this, that *by the law*, as it then stood, notwithstanding some invidious, nay dangerous, branches of the prerogative were afterwards lopped off, and the rest more clearly defined, the people had a larger portion of real liberty than they had enjoyed in this country since the Norman conquest; and sufficient power residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative: for which we need but appeal to the memorable catastrophe of the next reign. For when King Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could and did resist him; and, in consequence of such resistance, obliged him to quit his enterprise and his throne together.] And this introduces us to the last period of our legal history, viz.—

(*r*) Blackstone (vol. iv. p. 438,) adds to the measures of the time of Car. II. of which he approves, the "Test and Corporation Acts," "which secure both our civil and "religious liberties;" and he subjoins the following note, "The "point of time at which I would "choose to fix this *theoretical* perfection of our public law, is the "year 1679, after the Habeas "Corpus Act was passed, and that "for licensing the press had expired; though the years which "immediately followed it, were "times of great *practical* oppression."

VI. From the Revolution in 1688, to the present time. And in the first place we will refer to the many important measures which became law about the period of that event; as [the Bill of Rights, the Toleration Act, the Act of Settlement with its conditions, the Act for uniting England with Scotland, and some others. These statutes asserted our liberties in more clear and emphatical terms; regulated the succession of the Crown by Parliament, as the exigencies of religious and civil freedom required; confirmed and exemplified the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; indulged tender consciences in several points relating to religion: established triennial (since turned into septennial) elections of members to serve in parliament; excluded certain officers from the house of commons; restrained the king's pardon from obstructing parliamentary impeachments; imparted to all the lords an equal right of trying their fellow peers; regulated trials for high treason; set bounds to the civil list; placed the administration of that revenue in hands that are accountable to parliament; and made the judges completely independent of the sovereign, his ministers, and his successors. Yet, though these provisions, in appearance and nominally, reduced the strength of the executive power to a much lower ebb than in the preceding period, if, on the other hand, we throw into the opposite scale, (what perhaps the immoderate reduction of the antient prerogative may have rendered in some degree necessary,) the vast acquisition of force arising from the Riot Act, the annual expedient of a standing army, the vast acquisition of personal attachment arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest,—it will be found that the Crown, gradually and imperceptibly, gained almost as much in influence, as it apparently lost in prerogative.

[Such being the provisions passed for the assertion of our liberties, the chief alterations of moment in other directions during the earlier part of the period following the Revolution, were the solemn recognition of the law of nations with respect to the rights of ambassadors; the cutting off by a statute for the amendment of the law, a vast number of excrescences, that in process of time had sprung out of the practical part of it; the protection of corporate rights by the improvements in writs of *mandamus* and informations in nature of *quo warranto;* the regulation of trials by jury, and the admitting witnesses for prisoners, upon oath; further restraints upon alienation of lands in mortmain; the annihilation of the terrible judgment of *peine forte et dure;* the extension of the benefit of clergy, by abolishing the pedantic criterion of reading; the counterbalance to this mercy, by the vast increase of capital punishment; new and effectual methods for the speedy recovery of rents: the improvements which were made in ejectments for the trying of titles; the introduction and establishment of paper credit, by indorsements upon bills and notes, which have shown the legal possibility and convenience, which our ancestors so long doubted, of assigning a *chose in action;* the translation of all legal proceedings into the English language; the establishment of the great system of marine jurisprudence, of which the foundations were laid by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases; and, lastly, the enlargement of view which introduced into our courts of common law, in some instances where narrower doctrines once prevailed, (particularly in the law of mortgage and of landlord and tenant,) the same principles of redress as were already established in our courts of equity.]

To come nearer our own time,—the most conspicuous event in our legislative annals has been the Act for the

union of Great Britain and Ireland, at the commencement of the present century; a measure recommended by the wisest and most unquestionable policy, to two nations so nearly connected by their geographical position and their common subjection to the same Crown, and so long already united in language, in civil institutions, and in arms. We may also single out for particular enumeration, the Reform Act of 1832, the statute by which municipal corporations were regulated, and the Act further to amend the representation of the people, which was passed in the year 1867: all statutes of transcendent importance, as having been designed to abate the indirect influence immemorially exercised by wealth and power, in our general and local institutions—while to these we may add the renewed efforts made in recent statutes to secure the purity of our parliamentary and municipal elections.

Of other measures of importance passed in the present century, those relating to the Church may next attract our attention; and here we may notice those by which protestant dissenters of all denominations, and such persons as profess the Jewish religion, or the faith of the Church of Rome, have been in general relieved from all restraints which before excluded them from free participation with their fellow subjects in political rights, as well as from all forfeitures and penalties in respect of their religious tenets: the Acts for commutation of tithes; for reform of the law relative to pluralities and residence; for the better application of cathedral revenues; and those measures which have been devised for the extension of the places of worship belonging to the established Church, and the general increase of her efficiency as regards the cure of souls.

On the merits of many of these changes, indeed, opinions have been much divided, as will always be the case upon questions connected with politics or religion; but a more unmixed applause may reasonably be claimed for the abolition of the slave-trade, and of slavery in the

colonies, and for the improvements that have been introduced in relation to our social economy,—particularly in relation to trade and navigation, to the sanitary condition of the people, to banking, to registration, to lunatic asylums, to gaols, to the law of marriage, to the all-important subject of the education of the masses of the people, to copyright and patent right, to charitable trusts and benevolent institutions, and to the general relief of the poor.

It is however in regard to the rights of property and the administration of justice, that the genius of reform has latterly displayed its chief activity, and where its achievements have been, upon the whole, the most triumphant. It would be impossible, without a tedious minuteness of detail, to do more than glance at these. But under the first head, our notice is particularly due to the improvements which have taken place in the law of inheritance, of prescription, of dower, and of the limitation of actions; to the better regulation of wills and testaments; to the deliverance of entails and the estates of married women from the thraldom of expensive and cumbrous forms of conveyance, and the substitution of better methods; to the introduction of greater simplicity and uniformity in several other particulars, and greater freedom of disposition, into that part of our legal system which relates to the alienation of land; and to the provisions for facilitating the conversion of copyhold estates into freehold, and thus emancipating them from the burthens of an oppressive tenure.

Under the reforms in the administration of civil justice may be particularized the better regulation of juries; the abolition of the antiquated forms of real actions, which had survived the lapse of ages only to subserve the purposes of chicanery; fresh improvements in the proceedings by way of the prerogative writs of prohibition, and mandamus; the many important and elaborate alterations which have been introduced in the forms of process and pleading; the reformation of the law of evidence;

the establishment of county courts throughout the kingdom, for the decision of civil cases up to a certain amount, so as to dispense justice cheaply and speedily at the doors of the people (a return, it will be noticed, to the policy of our Saxon ancestors); the transfer of matters matrimonial, and as to wills and intestacies, from the feeble and dilatory rule of the ecclesiastical courts, to a more vigorous, secular jurisdiction—the creation of a more satisfactory tribunal than before existed, for administering the laws regulating public worship in our churches; and the improvements which have been made in the Appellate Jurisdiction of the House of Lords and of the Privy Council.

With respect to the improvements of criminal justice, we may notice the consolidation of the law relating to most of the principal offences; the abolition of the benefit of clergy, and of prosecution by appeals; the better regulation of the law of principal and accessory, and of commitment and bail; the introduction of a variety of provisions tending to simplify the course of criminal proceeding, and to deliver it from technical difficulties; the allowance of counsel, in all cases, to address the jury for the prisoner; the remarkable mitigation which has generally taken place in the antient severity of our punishments; the establishment of a tribunal for the decision of such points of law as shall arise in the course of the trial and be reserved by the judge; and the withdrawal from the eye of the general public, of the execution of criminals who have been sentenced to death for murder.

Finally, we may here refer to the attempt which has been recently made to remove such obstacles as still remain to the speedy and effectual administration of justice, by the establishment of a Supreme Court of Judicature, uniting and consolidating in itself the former superior courts; and forming a grand tribunal both of original and appellate jurisdiction, in one or other department whereof redress may be sought for all injuries, whether civil or criminal,

in accordance with the rules of law as modified by the principles of equity.

Of the amount of success which has attended this effort it is perhaps as yet too early to pronounce a confident opinion; but many abuses which previously deformed our judicial proceedings have doubtless been removed by the new system—the advantages of which, as a whole, may be expected to develop themselves more clearly, when the difficulties inseparable on so considerable a change shall have gradually subsided, and a settled practice in the several divisions of the High Court of Justice become gradually established on a firm basis.

[Thus therefore, for the amusement and instruction of the reader, have been delineated some rude outlines of a plan for the history of our laws and liberties, from their first rise and gradual progress among our British and Saxon ancestors, till their total eclipse at the Norman conquest, from which they have gradually emerged and risen to the perfection they now enjoy, at different periods of time. It has been shown that the rules of law which regard the *rights* of each member of the community, whether considered in an *individual*, a *relative*, or a *social* capacity, the *private injuries* which may be committed in violation of these rights, and the wrongs which affect the public, or *crimes*, have been and are every day improving, and are now fraught with the accumulated wisdom of ages; that the forms of administering justice have also, (particularly in our own times,) received the assiduous care of the cultivators of legal science; and that our religious, civil, and political liberties, so long depressed in popish and arbitrary times, and occasionally threatened with absolute extinction, have since, in a constant course of progressive development, commencing at the happy era of the Revolution, been effectually vindicated and established. Of a constitution so wisely contrived, so strongly raised, and so highly finished, it is hard

[to speak with that praise which is justly and severely its due; the thorough and attentive contemplation of it will furnish its best panegyric.]

The admiration that it is calculated to inspire should lead to some reflection on the duties which attach to citizens born to so noble an inheritance. It was the stern task of our forefathers to struggle against the tyrannical pretensions of regal power: to us, the course of events appears to have assigned the opposite care, of holding in check the aggressions of popular licence, and maintaining inviolate the just claims of the prerogative.

But, in a general view, we have only to pursue the same path that has been trodden before us,—to carry on the great work of securing to each individual of the community, as large a portion of his natural freedom as is consistent with the organization of society, and to increase, to the highest degree that the order of divine Providence permits, the benefits of his civil condition. A clearer perception of the true nature of this enterprise, of the vast results to which it tends, and of the obligations by which we are bound to its advancement, has been bestowed on the present generation, than on any of its predecessors. May it not fail also to recollect, amidst the zeal inspired by such consideration, that the desire for social improvement degenerates, if not duly regulated, into a mere thirst for change;—that the fluctuation of the law, is itself a considerable evil;—and that, however important may be the redress of its defects, we have a still dearer interest in the conservation of its existing excellencies.

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